

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-4118

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE LONG ISLAND RAILROAD COMPANY, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, and THE INTERSTATE
COMMERCE COMMISSION, *Respondents,*

S&K FARMS, INC., and FREIGHT USERS ASSOCIATION OF
LONG ISLAND, INC., *Intervening Petitioners,*

SOUTHERN PACIFIC TRANSPORTATION COMPANY, THE ATCHI-
SON, TOPEKA AND SANTA FE RAILWAY COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS SOUTH-
WESTERN RAILWAY COMPANY, and UNION PACIFIC RAIL-
ROAD COMPANY, *Intervening Respondents.*

PETITION FOR JUDICIAL REVIEW OF AN ORDER OF THE
INTERSTATE COMMERCE COMMISSION

JOINT APPENDIX

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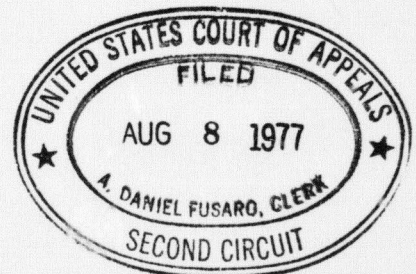
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Docket Entries.

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COMMISSION PROCEEDING		DOCKET NO. 36432	TITLE FRESH FRUITS AND VEGETABLES FROM THE SOUTHWEST		
VOLUME I					
NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION	
1.	PROTEST: and PETITION FOR SUSPENSION	8/27/76	39	TEXAS CITRUS & VEGETABLES GROWERS & SHIPPERS (by C. K. Rivera)	
2.	PROTEST	8/29/76	2	MEL FINERMAN CO., INC. (by A. P. Carpenter)	
3.	" "	8/30/76	1	AUNT MID PRODUCE CO., INC.	
4.	" "	8/31/76	1	NEW YORK BRANCH OF UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION, INC. (by S. S. Glatz-r)	
5.	" "	" "	1	SHIPPERS SERVICE CO.	
6.	" "	" "	6	THOMAS J. HOLT COMPANY, INC. AND PHILADELPHIA TERMINALS MARKETING ASSOCIATION (by T. J. Holt)	
7.	" "	9/1/76	5	M & C PRODUCE COMPANY (by J. J. Lerro)	
8.	" "	" "	1	BALTIMORE BRANCH OF UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION, INC. (by J. Ringgolf)	

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9.	PROTEST	9/1/76	1	N. SINGER'S SONS CORP. (by N. Singer)
10.	" "	" "	1	KRISP-PAK SALES CORP. (by B. Coondel)
11.	" "	" "	1	RUBIN BROTHERS (by J. Rubin)
12.	" "	" "	1	MOVSOVITZ & SONS OF FLORIDA, INC. (by L. Movsovitiz)
13.	" "	9/2/76	1	TONY-LIN PRODUCE CO.
14.	" "	" "	1	S. STROCK & CO., INC. (by S. Strock)
15.	LETTER: Transmitting corrections for protest in item #6 above.	" "	8	THOMAS J. HOLT COMPANY, INC. AND PHILADELPHIA TERMINALS MARKETING ASSOCIATION (by T. J. Holt)
16.	LETTER: Transmitting corrections for protest in item #7 above.	" "	7	M & C PRODUCE COMPANY (by J. J. Lerro)
17.	PROTEST: and PETITION FOR SUSPENSION	" "	7	FOOD FAIR STORES, INC. (by J. R. Plunkett)
18.	" " " " " " " "	" "	6	THE STOP & SHOP COMPANIES (by S. E. Tollo)
19.	PROTEST	" "	1	D'ARRIGO BROS. COMPANY OF NEW YORK, INC. (by J. A. Urig)

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20.	PROTEST	9/2/76	1	BOSTON CHAPTER OF UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION (by J. W. Maloon)	
21.	SUPPLEMENT: To protest in item #2 above.	9/3/76	1	MEL FINERMAN COMPANY, INC. (by A. P. Carpenter)	
22.	PROTEST	" "	1	QUAKER CITY PRODUCE CO. (by J. H. Ballezzi)	
23.	" "	" "	1	W. CHAS. HEITMULLER CO. (by J. J. Drach)	
24.	" "	" "	1	COMMUNITY-SUFFOLK, INCORPORATED (by W. Austin)	
25.	" "	9/6/76	1	HARRY KLEIN PRODUCE CORP. (by J. M. Leap)	
26.	" "	9/8/76	1	PETER CONDAKES COMPANY, INC. (by J. P. Condakcs)	
27.	REPLY: To petitions and protest in item #'s 1, 2, 6, 7, 17 and 18 above.	9/9/76	17	RESPONDENTS (by C. M. Herzberg)	
28.	AMENDMENT: To protest and petition for suspension in item # 17 above.	" "	2	FOOD FAIR STORES, INC. (by J. R. Plunkett)	
29.	TELEGRAM: Addressed to C. M. Herzberg, S. E. Tollo and J. R. Plunkett, advising that Suspension-Fourth Section Board voted not to suspend proposed (cont.)	9/10/76	1	ROBERT L. OSWALD, Secretary	

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29.	(CONTINUED) increases on fresh fruit and vegetables effective 9/15/76 in specified tariffs.			
30.	PROTEST	9/10/76	1	SUPERIOR TRAFFIC SERVICE, INC. (and 23 other protestants)
31.	PETITION (Telegram): For reconsideration expedited handling request	9/13/76	1	FOOD FAIR STORES (by J. R. Plunkett)
32.	TELEGRAM: Addressed to Chairman ICC Suspension and Fourth Section Board, requesting further consideration of ruling by the Board. (expedited handling requested).	" "	1	TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS (by C. K. Rivera)
33.	TELEGRAM: Expedited handling request.	" "	1	MEL FINERMAN COMPANY AND TRAFFIC ENTERPRISES INCORPORATED (by A. Carpenter and R. D. Allen)
34.	ORDER: That an investigation is instituted; and that parties to specified schedules are made respondents to this proceeding.	9/17/76	3	DIVISION 2, Acting as an Appellate Division. Commissioners Hardin, O'Neal and Clapp.
35.	U. S. SENATE INQUIRY	9/27/76	2	HONORABLE LLOYD BENTSEN
36.	LETTER: Responding to item next above.	9/29/76	2	GEORGE M. STAFFORD, Chairman
37.	PETITION: For leave to intervene.	10/7/76	6	LONG ISLAND RAIL ROAD COMPANY (by G. M. Onken)

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38.	ORDER: That this proceeding is referred to an Administrative Law Judge for hearing commencing on 11/15/76, at the Offices of the Interstate Commerce Commission, Washington, DC., that respondents shall file with the Commission on or before 11/1/76, three copies of their cost studies and any other studies they expect to submit into evidence at the hearing; and that respondents shall make copies of the work papers to such studies available for inspection at the scheduled hearing.	10/12/76	1	COMMISSIONER HARDIN	
39.	FEDERAL REGISTER NOTICE: Publication synopsis of the order in the item next above.	10/19/76	1	BY THE COMMISSION	
40.	COMMENTS	10/21/76	3	E. M. MALLETT, INC. (by E. M. Mallett)	
41.	LETTER: Requesting that hearing scheduled for 11/15/76 be cancelled; that a pre-hearing conference be scheduled instead; that the hearing in turn be rescheduled to a date approximately 30 days after the pre-hearing conference and petitioning for leave to intervene.	11/8/76	2	NATIONAL ASSOCIATION OF FOOD CHAINS (by R. K. Kolins)	

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42.	ORDER: That petition in item #37 above is <u>granted</u> .	11/8/76	1	COMMISSIONER O'NEAL	
43.	JOINT MOTION: For continuance and request for prehearing conference.	11/11/76	8	WESTERN GROWERS ASSOCIATION (by J. L. Guttero)	
44.	ORDER: That hearing proceed as scheduled before an Administrative Law Judge, commencing on 11/15/76, at the Office of the Interstate Commerce Commission.	11/12/76	1	DIVISION 2, Commissioners Hardin, O'Neal and Christian.	
45.	LETTER: Responding to comments in item #40 above.	11/12/76	1	HARVEY GOBETZ, Assistant Deputy Director, Section of Rates	
46.	HEARING: For testimony adduced and accompanying exhibits entered during the hearings held 11/15-16/76 see Volume 2 on page 9 herein.	11/15-16/76	396	WARREN C. WHITE, ADMINISTRATIVE LAW JUDGE	
47.	ORDER: That under provisions of section 15 (8)(e) of the Interstate Commerce Act respondents are required to keep accurate account in detail of all amounts received specifying by whom and in whose behalf such amounts are paid.	11/29/76	1	DIVISION 2, Commissioners Hardin, O'Neal, and Christian. (Commissioner Christian did not appear.	
48.	BRIEF	1/3/77	27	TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS (by R. K. Kolins)	

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49.	BRIEF	1/3/77	41	RESPONDENTS (other than Long Island Rail Road Company) (by R. S. M. Emrich, III, J. M. O'Malley and J. M. Smith)	
50	" "	" "	13	LONG ISLAND RAIL ROAD COMPANY (by W. J. Myskowski)	
51.	INITIAL DECISION: That respondents are notified and required to cancel specified schedules on or before 35 days from 2/24/77, upon not less than 1 days notice to this Commission, that this proceeding is <u>discontinued</u> ; and that this order shall become effective as the order of the Commission 20 days from 2/24/77.	2/24/77	36	WARREN C. WHITE, ADMINISTRATIVE LAW JUDGE	
52.	EXCEPTIONS	3/16/77	39	RESPONDENTS (other than the Long Island Rail Road Company) (by R. S. M. Emrich, III, J. M. O'Malley and J. M. Smith)	
53.	MOTION TO STRIKE and REPLY TO EXCEPTIONS in item next above.	3/28/77	13	TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS (by R. K. Kolins)	
54.	REPLY: To exceptions in item #52 above.	4/4/77	18	LONG ISLAND RAIL ROAD COMPANY (by R. H. Stokes)	
55.	REPLY: To motion to strike in item #53 above.	4/15/77	7	RESPONDENTS (other than the Long Island Rail Road Company) (by J. M. Smith)	

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56.	MOTION: To strike reply to motion to strike in item #55 above.	4/19/77	6	TEXAS CITRUS AND VEGETABLES GROWERS AND SHIPPERS (by R. K. Kolins)		
57.	ORDER: That motion to strike in item #53 above is <u>granted</u> ; that page 14, lines 7 through 25, page 15, lines 1 through 17 and the appendix of the exceptions in item #52 above are <u>stricken</u> ; that in adopting the ALJ's initial decision in item #51 above as their own, specified additions and modifications are made; and that this proceeding is <u>discontinued</u> .	4/20/77	4	DIVISION 2, Commissioners Hardin, Clapp, and Christian.		
58.	LETTER: Addressed to J. M. Smith, advising that the reply in item #55 above is being returned due to untimely filing.	4/21/77	1	JANICE M. ROSENAK, Deputy Director, Section of Rates		
59.	LETTER: Addressed to R. K. Kolins, advising that the motion in item #56 above is being returned due to untimely filing.	4/21/77	1	" " " " "		
60.	PETITION: For a finding of general transportation importance.	4/25/77	3	LONG ISLAND RAIL ROAD COMPANY (by R. H. Stokes)		
61.	PETITION: For leave to intervene.	5/2/77	5	FREIGHT USF & ASSOCIATION OF LONG ISLAND, INC. (by G. C. Pezold)		

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62.	PETITION: For a finding of general transportation importance.	5/4/77	4	TEXAS CITRUS AND VEGETABLES GROWERS AND SHIPPERS (by R. K. Kolins)	
63.	MOTION: To strike portion of petition in the item next above.	5/13/77	3	RESPONDENTS (other than the Long Island Rail Road Company) (by J. M. Smith)	
64.	REPLY: To petition in item #61 above.	5/13/77	6	" " " " " "	
65.	ORDER: That petitions in item #'s 60, 61, 62 above are <u>denied</u> .	5/25/77	1	BY THE COMMISSION. (Commissioner Christian voted to grant the petition for leave to intervene. Chairman O'Neal did not participate.)	
66.	NOTICE: A court action was instituted on or about 6/7/77 involving this proceeding before the United States Court of Appeals for the Second Circuit.	6/16/77	1	H. G. HOMME, JR., Acting Secretary	
END OF VOLUME 1 AND THIS PROCEEDING		TOTAL PAGES	779		
* * * * *		* * *	*	* * * * *	
<u>VOLUME 2</u>					
<u>TRANSCRIPT OF TESTIMONY AND ACCOMPANYING EXHIBITS</u>					
<u>PAGES</u>		<u>Exhibits in Evidence</u>			
1-160		1-4	11/15/76	N/A	
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HEARING CLOSED.					

Order Filed September 17, 1976.

SERVICE DATE

ORDER

SEP 17 1976

EXTRA COPY

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2,
acting as an appellate division, held at its office in
Washington, D. C., on the 14th day of September, 1976.

No. 36432

FRESH FRUITS AND VEGETABLES, FROM THE SOUTHWEST

There being under consideration the matter of rates and charges, and the rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce of fresh fruits and vegetables, from points in the Southwest to points in the East, South and West, as set forth in the following:

SOUTHWESTERN FREIGHT BUREAU, AGENT:

Tariff 8, ICC 5208, in SUPPLEMENT 31, on pages 3 and 4,
ITEMS 4560-A, 8800-A through 8810-A, 10700-A, 10702-A,
10704-A;

Tariff 26-N, ICC 5138, in SUPPLEMENT 45, on page 2,
ITEMS 3955-C through 4160-A

Tariff 69-M, ICC 4917, in SUPPLEMENT 51, on pages 2
and 3, ITEMS 1100-D, 1105-A and ITEMS 1115-A, 1575-D,
1600-D through 1790-D

Tariff 277-C, ICC 4735, in SUPPLEMENT 267, on page 2
ITEM 9500-H

Tariff 354-C, ICC 5084, in SUPPLEMENT 200, on pages
2 and 3, ITEMS 7200-D, 16050-D through 32710-D,
32712-C, 32714-D through 32902-D, 35940-C, 35942-E
through 35946-E, 35950-E

Tariff 355-C, ICC 5062, in SUPPLEMENT 228, on page 2
ITEMS 5510-D, 5520-D, 5522-B, 5524-C, 5526-C, 5528-C

Tariff 357-C, ICC 5215, in SUPPLEMENT 26, on page 2
ITEMS 5350-A through 5356-A

Tariff SW-2004-J, ICC 5160, in SUPPLEMENT 89, on pages
2 and 3, ITEMS 7550-A, 11400-A, 16200-A, 16201-A, and
ITEMS 20400-A through 20402-A, 20405, 20750-A, and all
rates in rate columns 3060 through 3065

JOINT TARIFFS

SOUTHWESTERN FREIGHT BUREAU, AGENT,

Tariff SW/E 2005-J, ICC 5049,

TRAFFIC EXECUTIVE ASSOCIATION-EASTERN RAILROADS, AGENT,
ICC C-937:

In SUPPLEMENT 144, on pages 2 through 5 ITEMS 7550-D,
7551-D, 20400-D, 20401-C, and all rates in rate columns
3060 through 3065

to
KHS
from
WGM

NO. 36432

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SOUTHWESTERN FREIGHT BUREAU, AGENT,
 Tariff SW/W 2006-J, ICC 5056,
 WESTERN TRUNK LINE COMMITTEE, AGENT,
 ICC A-4860:
 In SUPPLEMENT 148, on pages 2 through 4, ITEMS 7550-C,
 7551-C, 11400-C, 16200-C, 20400-F, 20401-C, 20402-D,
 20403-C, 20404-C, 20750-C, and all rates in rate columns
 3060 through 3065

SOUTHWESTERN FREIGHT BUREAU, AGENT,
 Tariff SW/S-2007-H, ICC 5042,
 SOUTHERN FREIGHT ASSOCIATION, AGENT,
 ICC S-1064:
 In SUPPLEMENT 141, on pages 2 and 3, ITEMS 7550-C,
 11400-C, 16200-C, 20400-C, 20401-C, and all rates in
 rate columns 3060 through 3065,

or as same may be amended or reissued:

It appearing, That upon consideration of the said tariff schedules, and protests thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules, regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates and charges, rules, regulations and practices contained in said schedules with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the proceeding herein be consolidated with the proceeding in Docket No. 36432 (Sub 1), Fresh Fruits and Vegetables, Transcontinental Eastbound.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates and charges, rules, regulations and practices under the Interstate Commerce Act.

And it is further ordered, That the carrier parties to the said schedules be, and they are hereby, made respondents to this proceeding; and that copies of this order be served upon the said respondents; and that notice of this proceeding be given to the public by posting a copy of this order in the Office of the Secretary of the Commission.

NO. 36432

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By the Commission, Division 2, acting as an appellate division. Commissioners Hardin, O'Neal and Clapp.

(SEAL)

ROBERT L. OSWALD
Secretary

A majority of the Division voted to investigate.
Commissioner Hardin voted to deny the appeal.
Commissioner O'Neal voted to suspend without prejudice to respondent's refiling on one day's notice a tariff which provides for rate increases of 50 percent or less, provided further that no rate shall be subject to a greater increase than that provided in the suspended tariff, and to suspend any change in the existing minimum weights.

13a

EXTRA COPY

Petition of the Long Island Rail Road For
Leave to Intervene.

X391

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 36432

FRESH FRUITS AND VEGETABLES FROM THE SOUTHWEST

Docket No. 36432 (Sub No. 1)

FRESH FRUITS AND VEGETABLES, TRANSCONTINENTAL EASTBOUND

PETITION OF THE LONG ISLAND RAIL
ROAD COMPANY FOR LEAVE TO INTERVENE

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 36432

FRESH FRUITS AND VEGETABLES FROM THE SOUTHWEST

Docket No. 36432 (Sub No. 1)

FRESH FRUITS AND VEGETABLES, TRANSCONTINENTAL EASTBOUND

PETITION OF THE LONG ISLAND RAIL
ROAD COMPANY FOR LEAVE TO INTERVENE

By various tariffs, the railroads other than The Long Island Rail Road Company (hereinafter "LIRR") sought to adjust and increase the rates and charges applicable on the interstate transportation on fresh fruits and vegetables from southwestern origins and on fresh fruits and vegetables moving eastbound transcontinentally. Although protested, the Commission refused to suspend the tariffs but by orders dated September 14, 1976, instituted the above-captioned investigations and ordered that they be considered on a consolidated record.

When the rates and charges were first proposed in the various railroad rate associations, the LIRR sought concurrence of the other railroads in

a rate level which when combined with the LIRR's terminal surcharge of 12-1/2 percent¹ would result in a level of rates and charges to points on the LIRR equal to the rates and charges applied by other railroads serving the New York, N. Y. rate group area. The other carriers refused to give LIRR the necessary concurrences even though all parties to the movement of the involved traffic would benefit from increased revenues thereby. Accordingly, the LIRR, in order to avoid having a rate structure on fresh fruits and vegetables 12-1/2 percent higher than the rest of the New York, N. Y. rate group at the expense of the public, was forced to flag out and retain the existing rate levels on these commodities.

In Docket No. 35960, Sunkist Growers Inc. v. A.C. & Y. RR., the Commission, Division 2, in a Decision and Order dated July 29, 1976, found that the failure of the railroads to establish a rate level which, when combined with LIRR's terminal surcharge, was at a level equal or similar to that applying to the rest of the New York, N. Y. rate group, violated Sections 1(5) and 1(6) of the Interstate Commerce Act.² The failure of the railroads other than LIRR to allow the establishment of rate levels on fresh fruits and vegetables to LIRR points which, when combined with LIRR's surcharge, equals those rates applying to the rest of the New York, N. Y.

1. Authorized in Ex Parte No. 299 (Sub No. 1)

2. The other railroads petitioned for reconsideration of this Decision and Order, which petition is still pending.

rate group, is as much a violation of Sections 1(5) and 1(6) of the Act as was their failure in Docket No. 35960.

In the instant consolidated proceedings, Division 2 ordered, inter alia, that the investigation "... shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates and charges, rules, regulations and practices under the Interstate Commerce Act." The Commission, of course, has the power pursuant to Section 15(1) of the Act to prescribe the just and reasonable level of rates in order to correct the other carriers' violation of Sections 1(5) and 1(6). Accordingly, the LIRR seeks to intervene in this consolidated proceeding so that if rates and charges are approved by the Commission herein for the rest of the New York, N. Y. rate group, appropriate rates and charges can be prescribed and made applicable to points on the LIRR simultaneously.

WHEREFORE, it is respectfully requested that the petition of the LIRR to intervene in the above-captioned proceedings be granted and that the issues included in the investigation specifically cover violations of Sections 1(5) and 1(6) of the Act by failing to include points on the LIRR and that the jurisdiction of the Commission to prescribe just and reasonable rates pursuant to Section 15(1) of the Act be invoked in the event of the other carriers continuing to fail to correct the violations of Sections 1(5) and 1(6) of the Act

and for such other and further relief as may be just and proper.

Respectfully submitted,

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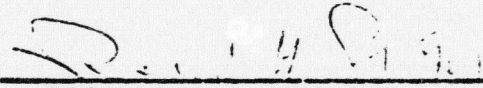
1200 18th St., N. W.

Washington, D. C. 20036

Attorneys for petitioner,
The Long Island Rail Road
Company

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of October, 1976,
served the foregoing document by first class United States mail, postage
prepaid, upon all known parties of interest.



RICHARD H. STOKES

19a
Order Granting Petition of Long Island Rail Road
to Intervene.

OH

ORDER

INTERSTATE COMMERCE COMMISSION

No. 36432¹

RECEIVED DATE

NOV 8 1976

JC 391

FRESH FRUITS AND VEGETABLES, FROM THE SOUTHWEST

PRESENT: A. Daniel O'Neal, Commissioner, to whom the matters which are the subject of this order have been referred for action thereon.

Upon consideration of the record in the above-entitled proceedings, and the petition for leave to intervene filed October 27, 1976 by The Long Island Railroad Company; and for good cause appearing:

It is ordered, That the petition for leave to intervene be, and it is hereby, granted.

Dated at Washington, D. C., this 8th day of November 1976.

By the Commission, Commissioner O'Neal.

ROBERT L. OSWALD
Secretary

(SEAL)

This order also embraces Docket No. 36432 (Sub-No. 1), Fresh Fruits and Vegetables, Transcontinental Eastbound.

RECEIVED
LAW DEPT.
NOV 11 1976
THE LONG ISLAND
RAIL ROAD COMPANY

Initial Decision.

OH

INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

SERVICE DATE

FEB 24 1977

No. 36432

FRESH FRUITS AND VEGETABLES FROM THE SOUTHWEST

Decided -----

Upon investigation, proposed level of incentive rates on fresh fruits and vegetables from Texas origins to destinations in the mid-western, eastern and southern states found to be just and reasonable at 133 percent of stated variable costs under section 1(b) of the Act; but (1) rates under investigation found to be unlawful in violation of Sections 1(6), and 3(1) of the Act and ordered cancelled without prejudice to the republication of such rates and related or alternative rates to points on the LIRR which, when combined with LIRR's surcharge, will make the total transportation charges paid by LIRR receivers the same as those paid by the other receivers in the New York City rate group; and (2) including therein in the overall adjustment a level of rates taking a 30,000 pound minimum on the considered commodities established at 10 percent above the proposed 40,000 pound rates; and (3) providing for multiple pickups of not less than 10,000 pounds per stop. Proceeding discontinued.

Richard S. M. Emrich, III, J. M. O'Malley, and John MacDonald Smith
for respondents.

Gordon M. Onken, Richard H. Stokes and Walter J. Myskowski for
intervener LIRR.

Ronald K. Kolins for protestants.

By Warren C. White, Administrative Law Judge:

Effective September 15, 1976, the Southwestern Railroads, in conjunction with their connections to the East and South, filed a comprehensive revision of rates on fresh fruits and vegetables originating in Southwestern territory. Respondents aver that the fundamental reason for the structuring of these rates is to create a rate structure which reflects the present day economics of rail handling of perishables. The railroads made the conscious decision to standardize on a car size which in their opinion would produce economical transportation for the shipper as well as a contribution to railroad overhead and profit. The previously existing rate structure had been established for a fleet of ice-cooled, low-cube refrigerator cars that have now mostly been phased out due to their complete obsolescence.

By order served September 17, 1976, Division 2 instituted this investigation into the reasonableness and lawfulness of the schedules. A companion order, entered in Docket No. 36432 (Sub-No. 1), instituted an investigation into the transcontinental eastbound rates on fresh fruits and vegetables, such investigation being instituted on the Commission's own motion. The transcontinental rates had been in effect for seven months, no proceedings were pending involving them, and no changes in the transcontinental rates were being made at the time the order of investigation was entered. The railroads filed a petition for

reconsideration of the order instituting investigation. Although no replies were filed, the petition was denied by Commission order served November 10, 1976.

By order served November 12, 1976, the Commission in effect severed the transcontinental and southwestern investigations, directing that the hearing in this docket proceed as scheduled on November 15, 1976, and also directing that the hearing scheduled in the Sub-No. 1 proceeding, involving transcontinental rates, be postponed until further order of the Commission.

Hearing was held before Administrative Law Judge Warren C. White at Washington, D. C., on November 15 and 16, 1976. At the hearing, evidence in justification of the rates under investigation was given by witnesses from Missouri Pacific Railroad Company (MP) and Southern Pacific Transportation Company (SP), on behalf of themselves and on behalf of all carriers participating in the movements, and evidence in opposition was given by witnesses for the Texas Citrus & Vegetable Growers & Shippers Association (Texas Growers).

The Long Island Rail Road Company (LIRR) was allowed to intervene by the Commission. It seeks affirmative relief involving rates to points on the LIRR.

Briefs were filed by the parties on January 3, 1977.

By order dated January 18, 1977, Division 2, in the due and timely execution of its functions, assumed jurisdiction and authorized waiver of the issuance of the Judge's initial decision. On February 4, 1977, the Division voted unanimously by votation to refer the circulated report back to this Judge for release as his initial decision.

STATEMENTS OF FACT AND ARGUMENT

I. Respondent's Case

A. Background of the Revised Southwestern Rates

The primary originating points for southwestern fruits and vegetables are in the perishable-growing districts in Texas customarily referred to as the "Winter Garden" and "Rio Grande Valley" districts. Crystal City, which is served by MP, and McAllen, which is served by both MP and SP, are the principal shipping points in the Winter Garden and Rio Grande Valley districts, respectively.

Evidence concerning the making of the rates, and lack of market dominance by the rail carriers, was given by Mr. W. M. Clayton, Jr., of the SP, and Mr. Arthur E. Capps, Jr., of the MP, respectively. Evidence concerning the cost of transporting the commodities involved was given by Mr. Klaus Brandt, of the SP. This evidence was given on behalf of all of the respondent railroads, except the LIRR.

B. Background and Reasons for Publication of Rates in Issue

Evidence concerning the background and reasons for the rate publication given on behalf of respondents show that the rates in issue involve increased rates on fresh fruits and vegetables from origins in Southwestern territory to destinations in Eastern, Illinois Freight Association, Southern Freight Tariff

Bureau Association, and Western Trunkline territories, as well as the concurrent cancellation of conflicting prior rates on the same commodities. Protests and petitions for suspension were filed by certain shippers and receivers, but the Suspension-Fourth Section Board declined to suspend the tariff schedules. On appeal, Division 2 ordered that an investigation be instituted into the lawfulness of the schedules.

Rates on fresh vegetables from Texas were prescribed by the Interstate Commerce Commission in 1928 in Consolidated Southwestern cases, 123 I.C.C. 203. These rates, which resulted in sharp reductions from prior rates, were published on a group-to-group basis from Texas to destination groups in the United States, east of the Rocky Mountains. Upon reconsideration, the Commission prescribed Column 30 (or 30% of First Class) on vegetables rated Class "C" in the Western Classification, except potatoes, and Column 38 (or 38% of First Class) on vegetables rated Fifth Class in the Western Classification. On potatoes, the Commission prescribed 27-1/2% of First Class.

These rates were again before the Commission in Southwestern Vegetable cases, 200 I.C.C. 355, decided April 27, 1934, rates pursuant to which became effective September 18, 1934. A supplemental prescription, 209 I.C.C. 606, became effective September 30, 1935. A supplemental prescription for root vegetables, with tops, became effective March 6, 1936, pursuant to second supplemental report, 214 I.C.C. 63.

In an effort to combat the pre-World War II truck competition, rail rates within the southwest were voluntarily reduced below the prescribed basis effective February 27, 1940. Further reductions were made within the southwest on November 17, 1940, and on December 2, 1940, the reductions were extended to a portion of Western Trunkline Territory to and including Omaha, Nebr., and St. Louis, Mo. In many cases, these reduced rates to the Mississippi River crossings, plus the rate beyond, produced lower rates from southwestern territory to official territory than the through one-factor rates prescribed in the proceedings cited.

In 1952, the Commission, in Texas Citrus and Vegetable Growers & Shippers v. AT&SF Ry. Co., 284 I.C.C. 206, prescribed distance scales of rates on carrots, fresh and green vegetables, and potatoes, from Texas to points in official territory. Not all vegetables were included in this order, as some vegetable rates reflected either rates previously prescribed in the Southwestern Vegetable cases, or the even lower combinations made over Mississippi River crossings. The rates to the Mississippi River crossings, insofar as they were used in combination to produce through rates to the East, were the subject of further proceedings when the railroads endeavored to fuse into each rate factor the Ex Parte 162, 166 and 168 Ex Parte Increases. This issue, together with further consideration of the 1952 prescriptions in Texas Citrus and Vegetable Growers & Shippers, supra, were incorporated in a new investigation instituted January 17, 1955, on the Commission's own motion in Docket 31711, Fresh Vegetables from Texas, California, Arizona and New Mexico. By this time, the rate structure on vegetables from Texas to the Midwest, East and South had become undesirably complex, as the operative rates which moved the traffic were in some instances through single factor rates, and in other instances, combinations on obscure base points, whose total effect could only be determined after application of specific rules in the increase tariffs establishing the amount of the increase that could be applied to both of the two factors.

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In an endeavor to bring about some simplicity into the southwestern vegetable rate structure, the railroads voluntarily revised their rates on fresh or green vegetables from the Southwest to eastern territory effective May 12, 1958, and to other territories on June 4, 1958. This provided, essentially, the basis of rates which has been brought forward to the present time, subject to authorized ex parte increases.

The foregoing rate history is simply that, history, as the Commission's orders prescribing maximum rates have, over the years, been vacated. The rates thus made, however, established the background for the rate action which the carriers took in 1974, and then in 1976.

In 1974, the carriers proposed, effective May 31, 1974, a comprehensive revision of rates on all fresh fruits and vegetables from the Southwest, as well as from the far western states, in tariffs which were suspended in I&S Docket 8944. These rates were ultimately disapproved by the Commission in I&S Docket 8944, and the carriers then went back to consider the rates anew.

I&S 8944 was a unique proceeding, which probably shall never have a counterpart in future rate cases before the Commission. Because of a series of delays requested by protestants, the evidentiary hearings continued, virtually to the eve of the expiration of the suspension period. While the carriers and all other parties were preparing their briefs, the Commission met in a hurriedly-convened session, issued an order of disapproval and directed that the rates be cancelled. Two-and-a-half months later the Commission issued its opinion giving supporting reasons for the disapproval. Fresh Fruits and Vegetables, Transcontinental and Western Points, 350 I.C.C. 228.

Convinced that they had been unfairly treated by the Commission, and that years of effort directed at a needed restructuring of marginal and noncompensatory rates had been summarily swept aside, the carriers sought review in the courts. However, the courts upheld the Commission's power to do what it had done. Atchison, Topeka & Santa Fe Ry. Co. v. Interstate Commerce Commission, 403 F. Supp. 1327, aff'd, June 21, 1976, 96 S. C. 3160.

After the decision in I&S 8944, however, Congress changed the rules. The legislative change is attributable in part to the railroads' beliefs that the scales had been unfairly weighted against the carriers in prior Commission decisions, as in I&S 8944.

In his speech "Agriculture and Railroad Regulatory Reform", delivered at the Idaho Grower Shippers Association Convention, September 1, 1976, Commissioner A. Daniel O'Neal referred to I&S 8944 and the 4R Act (p. 5):

"Also keep in mind that the Commission in December, 1974, rejected the western railroads' petition for a sizable increase on fresh fruits and vegetables on the grounds that the carriers hadn't made their case and that in some cases the rates did not appear to treat all those affected equitably. My point is that the railroads seem to feel that their services on agricultural commodities are underpriced, and they seem to want to do something about it and the 4R Act does give the railroads more freedom, within limits, to adjust their rates without the I.C.C. having the power to intervene."

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He continued (p. 9):

"...I think we can say that if there was ever any belief that preference should be given to the shipper of agricultural commodities, that belief no longer exists. Just as the depressed conditions of the farmer impressed the Congress in 1925, so the depressed condition of some of our major railroads - especially in the Northeast and Midwest - has impressed the Congress today. This reversal for the farmer seems to be part of the price of success." (Emphasis added)

The fundamental reason for the restructuring of rates involved in this proceeding has been to provide reasonably compensatory revenues for the work which the railroads do. The prior rates simply did not pay their way, and the railroads proposed new rates on a level sufficient to cover variable costs and provide a contribution which would enable the carriers to continue furnishing the service.

The cost exhibit, shows that the prior rates did not begin to cover their variable costs until shipment weights of 70,000 pounds and more were encountered.

In contrast, the new rates return about 130 percent of variable costs for volume movements to the major destinations. Table 1 shows the ratios, rate to variable cost.

TABLE 1
RATIOS, RATE TO VARIABLE COST
FROM McALLEN

TO	(Wt.)	40,000	50,000	60,000	70,000
Chicago		1.34	1.31	1.30	1.34
Boston		1.25	1.25	1.24	1.23
New York		1.27	1.26	1.24	1.26
Atlanta		1.31	1.28	1.30	1.29

FROM CRYSTAL CITY

TO	(Wt.)	40,000	50,000	60,000	70,000
Chicago		1.33	1.31	1.30	1.32
Boston		1.26	1.25	1.24	1.24
New York		1.30	1.28	1.27	1.28
Atlanta		1.32	1.29	1.31	1.29

It should further be noted that the rates in issue in this proceeding are incentive rates, which encourage shippers to load the cars as heavily as feasible. Thus the rates taper with increasing minimum weights, and the carriers share with the shippers the cost savings achieved as heavier loads are placed in the cars. This is consistent with the expression of the Commission in Increased Freight Rates and Charges, 1973, Nationwide, 344 I.C.C. 589 at 637, wherein the Commission took note of the continued need for restructuring rates on fresh fruits and vegetables to provide an incentive for heavy loading of mechanical refrigerator cars.

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It should further be noted that the rates in issue in this proceeding are on a basis from 8 to 16 percent lower than the rates proposed by the carriers in I&S 8944, supra.

C. Costs of Service

A Rail Form "A" cost study was made for the costs of transporting fresh fruits and vegetables from McAllen and Crystal City, Tex., to points in the Midwest, East and South, taking McAllen as representative of the Rio Grande Valley territory, and Crystal City as representative of the Winter Garden area, respectively. These are centrally located in the two producing areas, and the destination cities studied are the major population centers to which perishables are shipped.

Respondents took the 10 percent waybill sample of perishable traffic moving in the year 1973, which had been developed as part of the background material for the I&S 8944 case, and used this traffic study to obtain basic factors such as number of interchanges and mileage in the East, West, or South.

These factors were applied to the most recent available Rail Form "A" costs. In the case of the West and South, this was for the year 1975. The Railroad Associations in those districts annually prepare regional Rail Form "A" costs for those regions from a computer program prepared for them by the Commission. This was done because the Commission's own report was not available for 1975. That of 1974 was released just prior to the hearing. In the case of the eastern district, 1974 was the latest basic year which had been calculated by any group, and respondents used the Commission's 1974 data with indexing performed according to the formula in I.C.C. Statement 2-58. The western and southern costs were similarly indexed according to Statement 2-58 procedure to develop costs for the three regions as of July 1, 1976.

D. Market Dominance

The evidence of record in this proceeding is conclusive as to the fact that the railroads do not have market dominance in the transportation of southwestern fruits and vegetables. Both the railroads and the motor carriers have access to the major growing areas for fruits and vegetables, and both offer transportation service to the same destination markets. Market reports developed by the Texas Fruit & Vegetable Market News (a cooperative service of the U. S. Department of Agriculture) show that during the 1975-76 shipping season, vegetable shippers in Texas elected overwhelmingly to ship by truck. Overall, the truckers dominated the transportation market, handling approximately 87 percent of total vegetable traffic, with the rails receiving only 13 percent.

The U. S. Department of Agriculture unload statistics for the year 1975 show fruit and vegetable unloads at the 41 major cities compared to the major urban markets for fruits and vegetables. A comparison of rail and truck unloads from Texas for the year 1975 shows truck unloads outnumbering rail unloads by 29,426 to 2,090, or a ratio of more than 14 to 1.

Apart from the statistical evidence, there is abundant corroborative evidence to demonstrate that the trucks dominate the transportation of fresh fruits and vegetables from Texas. There are over 700 independently owned truckers competing for perishable traffic originating in Texas, with 29 truck brokers working to find loads for them. The fresh fruit and vegetable industry's trade newspaper, "The Packer", reporting on the Produce Marketing Association's Transportation Trends Workshop, concluded that trucks were going to continue to dominate the shipping of fresh produce in the foreseeable future.

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The fact that the trucks totally dominate the market for interstate transportation of fresh fruits and vegetables from Texas is conceded by protestants. The Executive Vice President of the Texas Citrus and Vegetable Growers & Shippers testified that "there is always a possibility of shipping by rail, and unfortunately it is getting to the point or it has gotten to the point where the rail carriers are now used for secondary. We, unfortunately, don't like to see that, but this is what has happened." He also stated:

"In comparing the two Appendices V and VI it can be determined that motor carriers are today handling almost 90 percent of the total interstate volume of fresh fruits and vegetables moving from Texas.

"Appendices VIII and IX show convincingly that the rail carriers have lost their 'market dominance' of their fresh citrus, melon and vegetable traffic from Texas to the two largest marketing areas for Texas produce, Chicago, Illinois and surprisingly to New York, N. Y. located more than 2,000 miles from the principal shipping points in Texas and long an exclusive rail market."

In fact, review of the evidence submitted by protestants fails to show any destination city or area in which the railroads could arguably be considered as having market dominance. The obvious reason for this is that there are none, and the evidence of the Texas protestants simply confirms that the rails are no longer a significant factor in the transportation of fresh fruits and vegetables from that state.

**E. Railroad Lack of Market Dominance
Precludes Commission from Finding
Rates in Issue to be Excessive**

The 4R Act contains a very substantial revision of § 1 of the Interstate Commerce Act; § 1(5)(b) now includes this language:

"Notwithstanding any other provision of this part, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service."

Section 1(5)(c) defines "market dominance" as:

"'Market dominance' refers to an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies;"

It is clear that the Commission cannot, on this record, make any finding that the railroads have "market dominance" for the transportation in issue. Commissioner O'Neal in his speech on "Agriculture and Railroad Regulatory Reform" also had this to say relative to the 4R Act and rate increases:

"On the other extreme, rate increases. Before the Commission may find that any rate is too high (i.e., exceeds a just and reasonable maximum) it must find that the (proposing) railroad has market dominance over the service rendered. What is market dominance? That's the big question

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which has a lot of high-priced lawyers and consultants arguing their views before the I.C.C. at the present time. Market dominance is referred to in the new Act as 'an absence of effective competition from other carriers or modes, for the traffic or movement to which a rate applies.'

* * * *

"..... A finding that a carrier does not have market dominance over a particular service eliminates I.C.C. power to suspend on the basis that the rate is too high. And the I.C.C. is lost for all subsequent proceedings, unless such finding is modified or set aside." (Emphasis added)

Since the Commission's guidelines in the rulemaking proceeding, Ex Parte No. 320,¹ in which the standards and procedures for ascertaining existence of market dominance are being considered had not been published at the time this proceeding was instituted, such guidelines do not control the Commission's action here.

Completely apart from any guidelines, or regulations which may be drawn to assist the parties and the Commission in determining the presence of "market dominance", no such finding could conceivably be made on this record. Regardless of what rebuttable inferences or presumptions might be established under general regulations, where official U. S. Government statistics show the traffic to be moving by truck by such lopsided ratios as are shown by this record, no commission, or court in the land could rationally make any finding that the railroads, with their low volumes of traffic, have market dominance here. Thus, the rates cannot be condemned as excessive.

F. The Rates In Issue

1. Minimum Weights Under 40,000 Pounds

Prior to the September 15, 1976, rate revision, rates on fresh fruits and vegetables from the Southwest, in view of their diverse routes, presented a complex array of differing rates on differing bases from differing origins.

The prior rates in many instances commenced with a minimum weight as low as 20,000 pounds, and as a result there were frequently weight brackets of 20,000 pounds, 25,000 pounds, 30,000 pounds, and 36,000 pounds, for certain commodities.

The low minimum weights in the prior rate structure reflected the relatively low carrying capacity of the now-obsolete ice bunker, or "RS", cars. The RS cars are now obsolete, and the Commission, in 1973, approved the discontinuance of carrier-furnished icing services for them. (Icing Services, U. S. Railroads, 343 I.C.C. 67)

However, protestants assert that for various reasons, including market resistance to large quantities or light density of the commodities or lack of sufficient carton strength, shippers still desire to ship

¹Ex Parte 320, Special Proceedings for Making Findings of Market Dominance, served October 1, 1976 (Review pending).

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some commodities (generally the leafy green vegetables) in unit loads of less than 40,000 pounds, even though the larger mechanical refrigerator cars are used. The shippers assert that it is unreasonable not to provide a 30,000-pound scale of rates for such shipments.

The shippers seem to be under the impression that a reasonable 30,000-pound minimum rate could be published by the railroad by some proportionate scaling down of the rates published for 40,000 pounds. This is not so, however, for the fundamental problem is that the railroads require a certain minimum amount of money per car to generate a reasonable return on the movement, and that reasonable return must cover the variable costs plus a contribution to overhead. The progression of variable costs does not increase proportionately with the load in the car; on the contrary, particularly in the lower minimum weight brackets, the incremental load added or subtracted has relative little impact on overall variable costs, and whatever the impact it is not proportionate to the change in weight. The cost study worksheets, show the combined cost in cents per hundred pounds at minimum weights beginning with 20,000 pounds. Multiplying these by the number of hundred weight in the car gives the statistics in Tables 2 and 3.

TABLE 2

VARIABLE COSTS AT WEIGHT BRACKETS FROM McALLEN, TEX.

	20M	30M	40M
To Chicago	\$1195.00	\$1245.30	\$1295.60
New York	1553.40	1746.90	1810.40
Boston	1847.20	1915.50	1983.60
Atlanta	1047.00	1092.30	1138.00

TABLE 3

VARIABLE COST REDUCTION, 30M UNDER 40M LOADS
FROM McALLEN, TEX.

To Chicago	3.88%
New York	3.51%
Boston	3.43%
Atlanta	4.02%

Tables 2 and 3 illustrate the fact that a 10,000-pound reduction from a 40,000-pound load reduces costs, not by one-fourth, but by about 4 percent. What protestants have in mind is a new 30,000-pound rate that produces total per car charges almost one-fourth under the 40,000-pound per car charges, but respondents resist such a reduction. If the carriers were to publish a new scale of 30,000-pound rates which preserves the contribution earned by the 40,000-pound rates, but gave the shipper the benefit of the cost reduction resulting from putting only a 30,000-pound rather than a 40,000 pound load in the car, the results would be as set out in Table 4.

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TABLE 4

HYPOTHETICAL 30,000-POUND RATESMcALLEN TO NEW YORK

40,000-Pound Rate: 574¢ Per Cwt.:	\$2296.00
less cost saving:	63.50
	<u>\$2232.50</u>

Hypothetical 30,000-Pound Rate: 744¢

McALLEN TO CHICAGO

40,000-Pound Rate: 433¢ Per Cwt.:	\$1732.00
less cost saving:	50.30
	<u>\$1681.70</u>

Hypothetical 30,000-Pound Rate: 561¢

McALLEN TO BOSTON

40,000-Pound Rate: 622¢ Per Cwt.:	\$2488.00
less cost saving:	68.10
	<u>\$2419.90</u>

Hypothetical 30,000-Pound Rate: 807¢

McALLEN TO ATLANTA

40,000-Pound Rate: 373¢ Per Cwt.:	\$1492.00
less cost saving:	45.70
	<u>\$1446.30</u>

Hypothetical 30,000-Pound Rate: 482¢

The foregoing shows that any scale of 30,000-pound rates, constructed to provide the same minimum contribution as the present charges under the 40,000-pound rates, but according to the shipper the benefit of all cost savings resulting from the lower load in the car, would represent only a very small reduction in total per-car charges. Illustrative prior rates were at minimum weight 30,000 pounds to Chicago and New York; from McAllen to Chicago, 316 cents; and from McAllen to New York, 385 cents. There was some suggestion that Texas shippers would not object to an increase of the prior 30,000-pound rate by 35 percent. But increasing the prior Chicago and New York rates by 35 percent would produce rates of 427 cents to Chicago and 520 cents to New York, whereas hypothetical 30,000-pound rates constructed on a basis related to the present 40,000-pound rates would produce rates of 561¢ and 744¢, respectively. Thus the 30,000-pound rates which the shippers apparently would not protest would be about 25 percent below what the carriers would be willing to publish, if there were a serious demand for 30,000-pound rates. The rates which the shippers would be willing to pay at 30,000 pounds would only be those that would break down the entire rate structure published by the carriers, that is, lower rates at lower minima, which would necessarily destroy the higher rates at higher minima already published by the carriers.

From the foregoing facts, it must necessarily be concluded that it is not feasible to accommodate the desires of the shippers insofar as 30,000-pound rates are concerned. The shippers desire 30,000-pound rates so low as to break down rates at higher minima already published by the carriers. This the carriers are not willing to do. If the carriers were to publish a 30,000-pound scale related to the existing 40,000-pound rates, and providing the same contribution, the actual reduction in per-car charges under the 40,000-pound rates would be very slight, about 3 percent. The resultant rates in cents per hundred pounds would be higher than those that the shippers have been willing to indicate on this record, they would accept. On these facts, it must necessarily be concluded that the publication of 30,000-pound rates at a level acceptable to the carriers would serve no useful purpose, as the resultant charge per car would be substantially the same as the charge generated under the 40,000-pound rates.

2. Percent of Increases

The protesting shippers argued that the increases were abrupt and excessive, pointing to the percent of increases experienced at the various weight brackets.

The fundamental point which this argument overlooks is that the prior rates were woefully inadequate, far below variable costs at the lower weight minima. Thus, to Boston, protestants point to an 85.7 percent increase at the 40,000-pound weight bracket, but overlooked the fact that the prior Boston rate required a 48 percent increase before it would even reach the variable cost level. Thus the percent of increase required to place the rate structure on an appropriately compensatory footing necessarily overcomes years of prior subsidy of the Texas shippers through noncompensatory transportation services.

If the Commission in the past had any authority to require non-compensatory rates on fruits and vegetables in certain limited circumstances, it was revoked in the 4R Act. Amended § 1(5)(b) states:

"Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going-concern value of the proponent carrier to a level which contributes to such going-concern value and is otherwise just and reasonable."

Thus the increases in the lower weight brackets are attributable in substantial part to the fact that the prior rates were unreasonably low, producing a direct subsidy at the expense of the railroads and their other customers, for the benefit of Texas shippers. That subsidy has been properly withdrawn.

But there is more to be said in response to the shippers' argument. The increases taper, with the result that at the very highest weight bracket there are actually significant reductions under the prior rates. SP's traffic records show that 69 percent of its Texas perishables consisted of carloads of carrots, cabbage, and onions, all of which can and do load well in excess of 60,000 pounds. In fact, 55 percent of SP's carrot shipments, representing 16 percent of the SP perishable movement, consisted of bulk carrots with a carload average of 95,942 pounds. The rail charges on these carrot shipments were substantially unchanged, averaging \$2,561.65 per car prior to the publication of the new rate structure, and \$2,590.04 after, an increase of 1.1 percent.

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Considering the fact that heavy loading, or potentially heavy loading, shipments constitute 69 percent of the perishable total, a more accurate characterization of the effect of the increases would be that the actual increases resulting from the new rates range from 30 percent down to nothing, and in some cases producing reductions, for the bulk of the rail traffic.

Thus the large percentage increase figures cited by protestants pertain to the light loading traffic, traffic which has been carried for years at horrendous out-of-pocket losses, and is traffic for which the railroads cannot, from a cost standpoint, effectively compete with the exempt trucks which dominate the market.

3. Florida Competition

The protesting shippers complain that Florida vegetable rail rates have not been readjusted to reflect the obsolescence of the old ice bunker refrigerator car, as the Florida vegetable rates are still based upon small, 33-foot 6-inch length refrigerator cars, with minimum weights of 20,000, 24,000 and 30,000 pounds. The shippers further complain that the level of the rail rates is relatively lower from Florida than from Texas. Grapefruit is cited as an example of this disparity.

Respondents observe that the rate exhibits do not entirely support the claim in the text. Statistics reveal that car-mile earnings are lower from Texas than from Florida to Boston and New York, major receiving points.

Also, to the extent grapefruit is shipped from Texas, it is not shipped in any volume by rail. The seasons' report from the Texas Fruit & Vegetable Market News shows two rail cars of grapefruit shipped from Texas compared to 10,865 trucks. The U.S.D.A.'s statistics for unloads in the 11 cities during 1975 show 5 Texas grapefruit rail unloads, compared to 3,415 Texas truck unloads, or a ratio of 691 truck shipments for every rail shipment.

More fundamental, however, is the fact that the Florida shippers do not rely on the railroads to any material extent and, in terms of the rates which actually move the traffic, the rail rates are largely "paper" rates. As previously noted, the rail movement of grapefruit from Texas is negligible. There is a more substantial movement of carrots by rail from Texas. For every Florida rail car, however, there were 24 Florida truck shipments. Cabbage is a commodity which moves by rail from Texas. For every rail carload of cabbage from Florida, however, there were 65 truck shipments of cabbage. Lettuce, which accounts for some rail movement from Texas, was moved entirely by truck from Florida. The rail versus truck dry onion shipments from Florida were not available. Peppers move by rail from Texas in small quantities. The Florida movement of peppers was 35 truck shipments for every rail car. Potatoes move in negligible volume by rail from Texas (one rail shipment to each 169 truck shipments). Florida truck shipments of potatoes outnumbered Florida rail shipments by more than 10 to 1.

Thus, respondents aver that:

"...the rail rates from Florida on perishables are not the controlling rates actually moving the counterpart commodities from Florida origins to eastern destinations. On the contrary, the controlling rates are those of the exempt truckers with rail rates used on a standby basis. In short,

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the Florida competition of which these shippers complain, actually depends on motor carrier service and no realignment or readjustment of rail rates, Texas versus Florida, is going to have the slightest impact upon the Florida truckers whose rates are the going rates for transportation of Florida vegetables."

Although the Texas protestants maintain that their principal competition comes from Florida, the Texas protestants do not claim that the controlling competition comes from the handful of shippers in Florida who, for one reason or another, are still using rail service.

In view of the statistical evidence showing that the Florida shippers are overwhelmingly committed to truck service, the most that the Texas shippers can say is that buyers are "concerned" with delivered cost, that transportation cost has a bearing on which mode is used, that customers are interested in determining the laid-down cost of Texas vegetables versus the laid-down cost of vegetables from other areas, and that Florida shippers have "available" to them more favorable rail rates than do Texas shippers.

A review of protestants' evidence confirms that there is no evidence whatsoever that the alleged Florida competitors use rail service to any significant extent, if at all, or that the rail rates from Florida are anything but "paper" rates.

The protestants, in alleging that the Texas rates are unduly prejudicial and preferential of Florida shippers under § 3 of the Act, have a greater burden than merely showing that the Florida shippers have "available" to them rates which appear to be more favorable than the Texas rates. They must go further and show that those "available" rates are in fact used in sufficient volume to enable the allegedly preferred producers to influence the market price which the Texas shippers must meet.

The Commission reviewed the requirements of § 3 in Lynchburg Traffic Bureau v. Chesapeake & O. Ry. Co., 319 I.C.C. 74, 81:

"On exceptions, the complainant urges that its showing of more favorable rates to Danville than to Lynchburg establishes a prima facie case of undue prejudice and preference, in violation of § 3 of the Act; and that, as a matter of law, the burden to show conclusively that the rates here complained of are not unduly prejudicial or preferential rests upon the defendants. In support, it cites New York v. United States, 331 U.S. 284, in which the following appears:

'It is a matter of right, not by grace by the railroads, that regions and shippers shall not be prejudiced or their competitors preferred.'

"Nothing in the foregoing decision may be interpreted as overruling the oft-repeated holdings of the courts and the Commission that a mere difference in rates or in distances between particular points at the same rate is inadequate support for a § 3 finding; and that the burden of supporting an allegation under that section with adequate proof rests upon the complainant.

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To establish undue prejudice, in addition to the showing of a rate difference or a difference in distance at the same rate, there must be evidence of forceful competition between persons or localities under the rates complained of, and that the rate adjustment has operated to the complainant's disadvantage. See Gudany Packing Co. v. Atchison, T. & S.F. Ry. Co., 234 I.C.C. 569-575." (Emphasis added)

As further proof that the differences in rates, Texas versus Florida, do not present a case of § 3 discrimination, is the fact that relief under a § 3 order is customarily in the alternative: The carriers have the option of increasing the allegedly preferential rate, reducing the allegedly prejudicial rate, or both. If the rail carriers serving Florida should increase their rates, what effect would this have on the Texas "competitors"? First, many Texas vegetables are not moving by rail in significant volume today, and surely the Texas truck shippers cannot claim "prejudice" in the Florida rail rates.

Second, if Florida rail rates should be increased, it can reliably be predicted that there will be no material effect on the overall transportation charges from Florida to major eastern and midwestern markets, as the movement statistics show that the truck shipments outweigh the rail shipments by a lopsided margin, and those truck shipments will be wholly unaffected by any order increasing rail rates.

There is no basis in this record for requiring the Texas carriers to maintain any "relationship" to Florida rail rates which were not shown to be moving any material proportion of the Florida traffic.

G. Affirm Give Relief Requested by
Long Island Rail Road Company
Cannot be Granted on this Record

By order dated November 8, 1976, the LIRR was granted leave to intervene in this matter. The LIRR requests affirmative relief, namely, that the Commission direct the railroads (including LIRR) to publish increases to LIRR railroad points. The increased rates which LIRR Island would have the Commission prescribe are not the same rates as apply to destinations in New York on the lines of other rail carriers, but something lower. The relief sought by LIRR is relief which cannot be granted in this docket.

The LIRR is owned by the State of New York, and provides extensive local, commuter and short-haul passenger services between New York City proper and points on Long Island. Though predominantly a passenger road, it also handles carload freight, and claims to have experienced exceptionally high costs in doing so.

The LIRR was able to take advantage of the unique nature of the Congressionally mandated pass-through of increased retirement expenses which was accomplished in Ex Parte 299 for the nation's railroads generally, and Ex Parte 299 (Sub-No. 1) for the LIRR decided by the Commission in Increases in Freight Rates and Charges - 1973, 350 I.C.C. 673, 711 et. seq.² By taking advantage of this unusual situation, the

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A majority of the Commission reaffirmed that decision by an order served December 9, 1976, which will probably be subject to judicial review.

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LIRR has been able to apply and retain a 12-1/2 percent surcharge on the entire linehaul revenue assessed against shipments terminating on the LIRR. The "terminal" surcharge is so structured that the LIRR also obtains its normal division of the applicable through rate and then retains the entire revenue from its 12-1/2 percent surcharge.

Given this situation, it would appear that rates to and from LIRR points would be 12-1/2 percent above those to and from nearby points on other railroads. But this is not the case, for LIRR has arranged to manipulate its right of independent action, where it can, to keep the rates to and from LIRR points below the level of rates to adjacent points in New York state, thus leaving a margin for the imposition of LIRR's 12-1/2 percent special surcharge without upsetting shippers and receivers located on the LIRR. In order to accomplish this program, LIRR has made it a practice to refuse to concur in rate revisions applicable to eastern territory generally, or acquiesce in the cancellation of old rate structures, and will grant concurrence in new rate structures, only if the other carriers are willing to publish a differentially lower single factor rate to Long Island points, so as to allow the Long Island to take its 12-1/2 percent surcharge without irritating its taxpayer-receivers.

Consistent with its practice, the Long Island refused to concur in the cancellation of the prior rate structures from the Southwest, unless the railroads should agree to publish a lower basis of rates limited to apply to LIRR points, which would allow LIRR to put its special surcharge on top, without increasing the aggregate charge to its receivers above the charges paid by receivers on other railroads in the same general area. Unless the other carriers were willing to concur in such a reduced basis of rates to LIRR points, LIRR would not concur in the cancellation of the obsolete rate structure, insofar as destinations on its line were concerned.

The other railroads balked at this ill-concealed blackmail, and refused to agree to the LIRR's demands. As a result, the LIRR refused to concur in the cancellation of the obsolete rates, with the result that there is a "pocket" of lower rated receivers situated on the lines of the LIRR.

The obsolete rates, which were cancelled to destinations on all other eastern railroads, were disastrously noncompensatory. The LIRR was not as drastically affected as other participants in the move, because LIRR took not only its normal division but also its 12-1/2 percent special surcharge. It still wanted to increase the base rate on which the surcharge was calculated, however.

LIRR thereupon seized upon the possibility of inducing the Commission to prescribe some increase in the old rates, thus enabling it to take a larger division and apply its special surcharge to a larger revenue base. LIRR suggests that the Commission may lawfully take such action here, pointing to the Commission's action in Docket 35960 as justification.

Docket 35960 started with a complaint filed January 11, 1974, by Sunkist Growers and other western citrus shippers against the Akron, Canton & Youngstown Railroad Co., et al., seeking an order prescribing maximum reasonable rates on citrus fruit. The substance of the complaint was that the carriers were applying an obsolete rate structure, designed for ice bunker refrigerator cars, which did not recognize the heavy loading capabilities of the large mechanical refrigerator cars then in service. Sunkist sought the prescription of a scale of incentive rates

which would produce an incentive to load cars heavily, thus reducing unit costs for the shippers while increasing per-car revenues for the railroads. The Sunkist complaint did not seek that rail rates be reduced across the board; quite the contrary, the scale of rates proposed by Sunkist incorporated substantial increases in the lower weight brackets, as compared to the prior rates.

One might at first blush wonder why a shipper would file a complaint proposing increased rates, but the answer is that the handwriting was on the wall, for a full-Commission decision, though disapproving a specific rail proposal, had stated that substantial increases in citrus rates were obviously justified. Citrus Fruits, Ariz. and Calif. to Eastern States, 341 I.C.C. 622 (Sept. 11, 1972).

The railroads were at that time at work constructing proposals for substantial increases in rates, which later were incorporated in the rate proposal considered by the Commission in I&S 8944. Thus the Sunkist complaint in effect sought to present its proposal for increased rates first, before the railroads could place in effect something which might be more onerous.

On March 4, 1975, Administrative Law Judge Frederick M. Dolan, Jr., rendered his initial decision approving substantial adoption of the scale proposed by Sunkist, and the prescription of such rates for the railroads.

While the matter was pending on exceptions, the railroads, in a change of position, concluded to render the complaint moot by voluntary publication of the Sunkist scale of rates. Such rates were published effective October 19, 1975.

However, the LIRR did not concur in the new publication. It petitioned for leave to intervene in the Sunkist proceedings, and sought the prescription of rates to LIRR points differentially below rates to other nearby points which would allow LIRR to apply its special surcharge and not exceed the scale of rates proposed in New York by the Administrative Law Judge, and published elsewhere by the other railroads. Sunkist, the complainant shipper, did not object to such a prescription.

On July 29, 1976, Division 2, in a brief decision and order, found that the action of the carriers in voluntarily publishing new rates had substantially rendered the complaint moot, except as to LIRR points, and that as to LIRR destinations, the rates proposed by LIRR, in which the shipper acquiesced, should be published.

This decision was the subject of a vigorous petition for reconsideration filed September 3, 1976. The rail carriers (other than LIRR) there pointed out that the Commission's decision lacked an adequate statement of findings and reasons, is internally inconsistent, does not produce substantial compliance with the Administrative Law Judge's order, and inconsistently relies upon Judge Dolan's findings explaining the reasonableness of prescription of rates at the X-305 level to justify the prescription of maximum reasonable rates at the much lower X-295 level to LIRR points. The petition further pointed out that the decision would prescribe rates to LIRR points below the variable costs of transportation, as recently determined by the Commission in its July 16, 1976, decision in I&S Docket No. 9092, Fresh Citrus Fruits, Transcontinental, Eastbound. The carriers pointed out that the complaint sought the prescription of single factor rates to destinations in the East, including LIRR points, and that the prescription of such a rate, while necessarily displacing any special surcharge which the LIRR would otherwise apply to other traffic, was the only

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consistent response to the complaint and the evidence of record. In the event LIRR believed that it should apply a local surcharge on top of the prescribed rates, or should seek some realignment of division, that could appropriately be dealt with in other proceedings. In any event, Long Island had presented no evidence whatsoever to explain why any different basis of rates should be prescribed to LIRR points, than applied elsewhere in the same general territory.

Respondents urge, therefore, that Docket 35960 does not serve as precedent for the question which LIRR seeks to raise here, for several reasons.

(1) The decision in Docket 35960, though administratively final, is headed for judicial review. It is the sentiment of a number of railroads affected that the Docket 35960 decision is, legally, extremely questionable, and will be vulnerable on court review. Whether or not this is a correct appraisal of the decision, it will not become judicially final for some extended period of time.

(2) There was no question of notice involved in Docket 35960. The shipper was not only willing to pay higher rates, but the shippers had an opportunity to, and did, express their views to the Commission on the increase proposal submitted by LIRR in that docket.

There is a serious question of notice in this proceeding. The manner in which rail rates are increased is strictly governed by law, and it does not encompass that LIRR has proposed here. The standard procedures are:

(a) The filing of a tariff of increased rates and charges, allowing the parties opportunity to file petitions for suspension and investigation, and thereafter be heard if the Commission directs an investigation. No tariff of increased charges was filed to LIRR points. The shippers were not put on notice of the proposal that LIRR had in mind.

(b) A general ratemaking or rulemaking investigation, duly noticed in the Federal Register. It is undisputed that none such was ordered here.

(c) An appropriate complaint or petition for investigation, served upon or providing appropriate notice to the parties affected. It is undisputed that the LIRR petition in this proceeding was not served upon the affected shippers on their line, but only upon the tariff publishing officers, who of course do not pay and bear freight charges, and who in any event do not normally represent the shippers.

It should be apparent that the controversy between the LIRR and the other railroads is essentially a divisions dispute. Although it maintains that it has exceptionally high costs, and needs greater revenues, it does not propose to increase its rates above the levels generally applicable throughout the territory, and wants its partners in the transportation to swallow, as it were, LIRR's increased costs. Thus the LIRR complaint is, regardless of the label attached to it, a classic divisions dispute.

The statement and stipulations by counsel establish that there has for many years been an established basis of divisions for the LIRR on inter-territorial traffic moving from the Southwest to points on the LIRR under single-factor, joint, through rates.

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After a complaint (No. 35153) and Commission proceedings decided in October, 1973, the basis of LIRR divisions was increased, and this increase came out of the eastern lines' proportion of the through rate. Thus, today the LIRR receives stated percents of the single factor through rate on traffic moving from Texas to LIRR points. The LIRR is not satisfied with its present share, however, and has served notice on other railroads that it desires to renegotiate divisions to give LIRR a larger share. The stipulated facts establish that there is a divisions disagreement in progress between the LIRR and the Southwestern Freight Bureau railroads.

The 4R Act establishes new procedures for the handling of divisions disputes (§ 15(6)(b) and the implementing regulations issued by the Commission in Ex Parte 322 require six months of bona fide negotiations prior to the filing of the complaint. Counsel for the LIRR state that the renegotiation notices served upon the other carriers comply with the requirements of the Commission in Ex Parte 322, and entitle them to file a divisions complaint at a subsequent time.

The LIRR is, in substance, concerned about divisions. It has no quarrel with the general level of rates applied by the carriers to other points in the same territory, and would apply them to points on its line in a moment, providing it can be assured a larger chunk of the revenue than it now receives under existing divisions agreements. And it seeks to achieve that result here by indirection, rather than in a direct and straightforward way, namely, by an appropriate showing to the Commission that its divisions should justly and reasonably be increased.

The point that the LIRR has raised is fundamentally a divisions dispute, and it does not belong in this proceeding. The LIRR will be left to pursue its remedy in the negotiation and complaint procedures contemplated for the adjustment of divisions disputes, and now mandated under the 4R Act.

A further reason for denying LIRR relief in this proceeding is that, in order to accord LIRR the relief which it wants, the Commission must necessarily find that rates approximately 12-1/2 percent below those published by the carriers to points in New York not on the Long Island, represent maximum reasonable rates. Leaving aside the obvious inconsistency in any such finding, the fact is that the 4R Act now proscribes any such finding where the railroads lack market dominance. This issue has already been covered and even the protestants concede that the railroads do not have market dominance for movements of southwestern perishables to New York.

Finally, the LIRR as the proponent of the rate change sought here necessarily has the burden of establishing, through competent evidence, that the changed rates should be prescribed to receivers on LIRR points. There is no evidence in this record to support the LIRR's request (except for the self-serving inter-railroad notice that LIRR wanted the basis of rates sought here) supporting the Long Island request, but only argument. The record completely fails to contain any evidence from which the Judge can make supporting findings for the LIRR request.

For all of the aforesaid reasons, this is neither the time nor the place to consider the LIRR request.

II. Intervenor's Case

A. Background

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It is the position of intervenor, LIRR, that the rates under investigation are unlawful in violation of Sections 1(5), 1(6), and 3(1) of the Act.

LIRR seeks rates to points on the LIRR which, when combined with LIRR's surcharge, will make the total charges paid by LIRR receivers the same or about the same as those paid by other receivers in the New York City rate group.

The present controversy, insofar as it pertains to LIRR, can be traced back to Public Law 93-69, which added a new Section 15a(4) to the Act in 1973. By that law, the railroads were required to incur substantially higher railroad retirement tax expenses, but were permitted to recapture the increased tax expense through freight rate increases by "any carrier or group of carriers." Because LIRR engages in interstate freight operations, it was also required to pay the increased railroad retirement tax expenses with regard to employees engaged in intrastate passenger operations, and the total additional tax expense incurred by LIRR was relatively much greater than that by any other railroad. All the other railroads, except LIRR, acted as a group and sought a uniform increase in their freight rates to "pass through" the increased tax expense, and the Commission finally approved an increase of 2.8 percent in Ex Parte No. 299, Increases in Freight Rates and Charges -- 1973, 350 I.C.C. 673. Since LIRR's freight revenues totaled less than \$10 million in 1973 and its projected increased railroad retirement tax expense exceeded \$6 million annually, if LIRR had joined with the other railroads, it would have received about \$280,000 or less than 5 percent of the increased tax expense, with the other 95 percent going to other railroads as a "windfall." It would have been an obvious mockery of the law to require LIRR -- whose freight revenues even in 1975 covered barely half of its freight expenses -- to join in the general freight rate increase and recover only 5 percent of the added expenses resulting from the enactment of P.L. 93-69, with the other railroads getting 95 percent of the added revenues authorized to cover LIRR's increased expenses.

LIRR, therefore, "flagged out" of the general 2.8-percent increase in Ex Parte No. 299, and published a separate terminal surcharge³ applicable on all freight traffic originating or terminating on points on the LIRR, with all of the proceeds therefrom accruing solely to LIRR. The Commission originally disapproved LIRR's separate terminal surcharge as an interim measure, but the Commission's action was reversed and the tariff approved by the three-judge District Court in Long Island R. v. United States, 388 F. Supp. 943 (E.D.N.Y. 1974). The Commission itself then approved the 12.5-percent surcharge in Ex Parte No. 299 (Sub-No. 1), (350 I.C.C. at 705-717) at the same time it approved the 2.8-percent general increase for all the other railroads. A petition for reconsideration by the Commission of its approval of LIRR's terminal surcharge, filed by the Western and Southern lines in Ex Parte No. 299 (Sub-No. 1), was denied by the Commission by order dated November 23 and served December 9, 1976.

LIRR has, in the past, "flagged out" or attempted to "flag out" of several general freight rate increases, and Ex Parte No. 299 did not mark the first time it had done so. In 1969, the evidence indicated

³The interim surcharge of 3.5 percent effective October 8, 1973, was increased to 5.5 percent effective January 1, 1974, and finally to 12.5 percent effective December 19, 1974. (350 I.C.C. at 705-706)

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that the general increases were self-defeating, so far as LIRR was concerned, with diversion of traffic offsetting the increases in rates. LIRR, therefore, tried to "flag out" of Ex Parte Nos. 262, 265, 267 and 281, but its efforts to do so were thwarted by the Commission and the other railroads, who refused to honor LIRR's "flag-outs". LIRR's right to take such independent action was finally confirmed by the Court of Appeals for the Second Circuit in Ajayem Lumber Corp. v. Penn Central Transportation Co., 487 F. 2d 179 (1974), and LIRR flagged out of Ex Parte Nos. 295 and several subsequent general increases without interference from the other railroads.

LIRR was, however, forced to concur in most of the general increases as a result of the legislation establishing the Consolidated Rail Corporation. That law apparently gave the new ConRail the option to adopt or reject existing joint rates with other carriers, and ConRail notified LIRR it would not adopt the then-existing joint rates to or from points on LIRR. In a compromise agreement⁴ with ConRail and the other carriers made effective in March of 1976, LIRR agreed to validate the unlawfully imposed increases in Ex Parte Nos. 262 through 281 and to join in the Ex Parte No. 295 and subsequent increases, except for Ex Parte No. 299 (2.8 percent) and Ex Parte No. 305 (10 percent). When LIRR's 12.5-percent surcharge is applied to the line-haul charges which, in most cases, are about 12.8-percent lower than those to other destinations in the New York City rate group, the total paid by LIRR receivers is about the same as that paid by their competitors. The compromise agreement enabled LIRR to retain its surcharge to cover its increased railroad retirement tax expense, as intended by the Congress in P.L. 93-69, while at the same time preserving joint rates to or from points on the LIRR and substantially restoring the integrity of the New York City rate group for shippers and receivers.

B. Basis For Relief

As the present proceeding shows so clearly, some railroads are still determined to frustrate the intent of Congress in enacting P.L. 93-69. Even though they were made whole by Ex Parte No. 299 (and in some cases, received a "windfall" at the expense of some Eastern lines) the Western lines are insisting they be allowed to share in the revenues earmarked to cover LIRR's increased retirement tax expense. If they cannot, then they have tried to cancel joint rates to or from points on LIRR, or insist that the total charges paid by LIRR receivers be made 12.5 percent higher than those paid by other New York City receivers, with a consequent diversion of some traffic from LIRR, or else insist that rates to or from points on LIRR be kept at abnormally low levels, with a consequent loss of revenues to LIRR and themselves.

In I.R.S. 9092, Fresh Citrus Fruit, Transcontinental, Eastbound, decided July 1, 1976, Review Board Number 4 disapproved the proposed cancellation of certain transcontinental joint commodity rates on fresh citrus fruits to destinations on the LIRR, noting at page 14 that "respondents have made no reply to LIRR's offer to implement a higher level of rates which would equal the basis to other destinations in the territory." A petition for reconsideration was denied by Division 2 by order dated October 6 and served October 8, 1976.

⁴The compromise agreement also ended the litigation then pending in Ex Parte No. 294, Investigation Into Joint Interstate and International Rates, Long Island Rail Road Company, when Division 2, by order dated April 23, 1976, discontinued the proceeding, in which the Commission was being asked to prescribe joint rates to and from points on LIRR.

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In Docket No. 35960, Sunkist Growers, Inc., et al. v. The Akron, Canton & Youngstown Railroad Company, et al., the railroads voluntarily made effective incentive rates, subject to higher minimum weights, at the X-305 level, which were substantially in accord with the initial decision of Administrative Law Judge Frederick M. Dolan, Jr., served March 4, 1975, but without providing alternative rates to points on LIRR. After a conflict of interest appeared and LIRR disassociated itself from the other railroads, Division 2 by decision and order served August 4, 1976, found that with respect to destinations on the LIRR, "the failure of defendants to establish alternative rates on the basis of the Ex Parte No. 295 general increase level violates Section 1(5) and 1(6) of the Interstate Commerce Act" and ordered the defendants and LIRR to establish and maintain rates to LIRR at that level. (Since LIRR had flagged out of Ex Parte No. 299 (2.8 percent) and Ex Parte No. 305 (10 percent), the total charges paid by the LIRR receivers, consisting of the line-haul rates plus LIRR's 12.5-percent surcharge, were substantially the same as those paid by their competitors. It was thought by LIRR that the Sunkist decision, now administratively final, had finally resolved the problem of assuring that LIRR would collect its X-299, Sub-No. 1 surcharge necessary to meet its increased tax expenses under P. L. 93-69, while at the same time assuring that LIRR shippers and receivers would pay reasonable and nonprejudicial transportation charges. The instant proceeding shows, however, that some of the railroads are still trying to find some way to frustrate the intent of Congress.

The prior rates which were replaced by the rates here under investigation were unquestionably abnormally low and noncompensatory, and the rates to LIRR points still are. The prior rates at the X-330 level were, of course, about 12.8-percent lower to LIRR points than to other points in the New York City rate group because of LIRR's flag-outs in X-299 and X-305, so that when LIRR's surcharge was applied, LIRR receivers paid about the same total charges as their competitors. At the time the proposed new rates were being considered by the General Freight Traffic Committee--Eastern Railroads, LIRR proposed an amendment to make rates to LIRR points which, when coupled with LIRR's 12.5-percent surcharge, would result in the same total charges as to other points in the New York City rate group. The amendment was voted down, and LIRR was given the choice of maintaining its present low level of rates or accepting the New York basis of rates which, when LIRR's surcharge is added, would virtually preclude any movement. Rather than join in such new rates, LIRR kept its low rates.

It should be clearly understood that LIRR's proposed amendment would result in more revenues for the respondent railroads, and that the rates proposed by LIRR would still be amply compensatory. For example, from McAllen, Tex., to New York, N. Y., the new rate, subject to a 40,000-pound minimum, is \$5.74 per 100 pounds, while the variable costs are \$4.726, resulting in a revenue-cost ratio of 1.27. The present rate to LIRR points is only \$2.97 per 100 pounds at the X-330 level, and the rate proposed by LIRR would be \$5.10, or almost double the presently effective rate. The \$5.10 rate would produce a revenue-cost ratio of about 1.16, which would still be compensatory, and when the \$5.10 rate is subjected to the 12.5-percent surcharge, the total charges paid by LIRR receivers would be about the same as those paid by other receivers in the New York rate group at the \$5.74 rate without the surcharge. In trying to force LIRR to give up its surcharge and to block the rate relationships prescribed in the Sunkist case, the respondent railroads are willing to forego almost half the revenue they would receive under LIRR's proposal.

At the hearing, counsel for the respondent railroads argued that the Commission could not prescribe rates to LIRR points, as it had done in the Sunkist case, because there has been no notice to LIRR

receivers that an increase in their rates was being considered and that they would be denied due process. In an investigation of the type here involved, the Commission does, of course, have very broad powers. In Ayrshire Collieries Corp. v. United States, 335 U.S. 573 (1949), the Supreme Court made it clear that in a proceeding under Section 15(7), the Commission has authority to determine the lawfulness not only of the proposed rates, but also that of existing rates. The new Section 15(3)(f)(1) and (4) under the 4-R Act makes it clear that the new law was not intended to modify the application of Section 3 "in determining the lawfulness of any rate" or "to affect the authority and the responsibility of the Commission to guarantee the equalization of rates within the same port." However, in order to avoid any question as to notice or due process, LIRR suggests that the respondents be required to publish related or alternative rates to LIRR points on the statutory 30 days' notice, with such rates being subject to protest and possible suspension and/or investigation.

III. Protestant's Case

A. Impact of the Proposal

Texas Growers, a protestant in the proceeding from its inception, is an organization which has represented the interests of fresh citrus, vegetables, and melon growers and shippers located throughout the state since 1942. It is a non-profit corporation whose members constitute approximately 95 percent of all growers and shippers located in Texas.

The matter of rail rate levels on fresh fruits and vegetables from Texas directly impacts the Texas growers and shippers in both pure economic terms and competitive terms. The cost of transportation bears upon the ultimate price of the products in the market place and thus affects their marketability and consumer acceptance. Additionally, the cost of transportation has an important bearing on the marketability of Texas fruits and vegetables to the extent that that cost differs from the transportation costs bearing upon the growers and shippers in other parts of the country with which the Texas growers and shippers must compete. This competitive situation is primarily evident between Texas, on the one hand, and Florida, on the other.

Clearly then, because the rates involved in this proceeding represent a dramatic increase over the prior rates, and because effectuation of these rates would result in Florida growers and shippers having significantly lower rail rates, thereby putting the Texas growers and shippers to a significant competitive disadvantage, the members of Texas Growers have a direct interest in this proceeding and are seriously concerned.

B. Characteristics of Fresh Fruits And Vegetables

Perhaps the most logical point of departure in viewing the nature and impact of this proceeding is to appreciate the characteristics of the products involved. While it is convenient to simply refer to them as "perishables," they are more than what that word connotes. Certainly, by their intrinsic nature, fresh fruits and vegetables can spoil, and, in fact, the deterioration process begins the very moment they are picked. Thus, transportation of the product must be prompt, reliable, and consistent if the lading is to be of a saleable quality when it reaches the marketplace.

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Many sales destinations are points far from the growing areas. By way of example, while Texas fruits and vegetables are sold throughout the United States, among the most active market points are Chicago and major northeastern cities. The perishables must not only reach these points in a quality condition, they must have enough remaining "shelf-life" to allow their orderly and economical absorption by the consuming public. It is therefore readily apparent that the "quality" of the transportation service has a major bearing on the saleability of the product and the mode utilized to transport it.

In addition however, there are other characteristics of the commodities involved which dictate under what conditions they must be transported. While this proceeding involves a great variety of different fruits and vegetables, even the railroads themselves essentially admit that only carrots, cabbages, and onions are considered "heavy-loading." All of the others then, cannot be heavily loaded because their density is not sufficient. Also, they require top-ice and/or greater air circulation and they may suffer damage from the crushing effect of "high-tiered" configurations of loading.

The problem with the mixed vegetables, is that they are impossible to get 40,000 pounds into the car unless stacked completely to the ceiling. Then they cannot be properly iced and the vegetables on the bottom of the container are crushed.

Moreover, very few if any markets can absorb very large loads of a perishable commodity. The perishables cannot be inventoried until needed and there are definite and natural limitations on the quantities that can be absorbed by the market at any given time. By way of example, cantaloupes cannot be loaded in excess of 40,000 pounds or product damage results. Reinforcing this weight maximum is the fact that receivers will accept such products only in limited quantities because the market can bear just so much.

Coupled with the foregoing are the pure economic ramifications of the case, which, as stated earlier, include not only the rate itself and how it affects the marketability of the product, but the competitive posture of Texas growers and shippers vis-a-vis their primary competitors in Florida.

At the outset then, this case concerns not only the rates which are its subject directly, but also the service factors underlying the movement of fruits and vegetables to market and, in turn, their marketability. It is a case, moreover, which also raises issues as to the responsiveness of the railroads to their common carrier duties and whether the notion of "compensatory" rates is properly invoked by the carriers as their overriding "rationale."

C. The Incentive Rates

The railroad proposal - now in effect pending the outcome of this investigation - incorporates a per hundred-weight rate scale predicated upon minima ranging from a "low" of 40,000 pounds to a high of 90,000 pounds. Because the rate per hundred becomes lower as minimum weight brackets become higher, such a scale of rates is rather loosely termed "incentive", ostensibly because it is designed to encourage heavier loadings. These "incentive" rates will have the opposite effect here.

The newly published rates represent increases to a magnitude of approximately 86 percent. Thus, they clearly represent a very dramatic increase over the rates in effect prior to September 15, 1976. Yet the railroads now publish such greatly increased transportation charges in the face of their own vociferous complaints that most of these products move by truck out of Texas. The railroads profess virtual incredulity at this phenomenon, yet they have done nothing to improve their service. Paradoxically, they respond to their loss of the traffic with much higher prices for that service.

Reduced then to its simplest terms, the railroads are herein supporting drastic rate increases despite a reduced share of the traffic coupled with their not having taken any steps to improve the service factors which have driven many shippers to the primary use of motor carriage. While they profess an interest in the traffic, the actions of the railroads reveal a disregard for their common carrier responsibilities as they pay mere lip-service to the needs of growers and shippers.

Accordingly, protestant argues that the rail rate increase at issue is unjust and unreasonable. The proponents have not only failed to satisfy their burden of proof, but their showing has revealed very clearly that the increase will have a variety of negative effects contrary to the public interest, the law, and sound public policy. It is urged that the carriers have failed to justify their action from a number of standpoints, including costs and the effect on users and the public. Not only are these conclusions inescapable from the record on its face, but the failures of the proponents are all the more glaringly evident when juxtaposed to the relatively recent full commission decision in Fresh Fruits & Vegetables Transcontinental & Western Points, 350 I.C.C. 226. That case was precipitated by a railroad proposal to increase rates on fresh fruits and vegetables from various points including Texas and the southwest. The circumstances attending that proceeding were virtually the same as those surrounding this proceeding. There the Commission strongly and properly rejected the carrier proposal as unjust and unreasonable. Here, by a filing which came less than a year and a half after the Commission's report was served in I & S Docket 8944, the railroads attempt, in a piecemeal fashion to receive what was previously denied them despite there being no change in circumstances in the interim to justify such a "reversal." As will be shown, the bases upon which the Commission soundly rejected the rail proposal in I & S Docket 8944 apply here and it would be incongruous for the Commission to now reach a contrary result.

D. Costs

The railroads continually stress the fact that they must charge rates which are commensatory. The notion of a rate level being compensatory does not negate the desirability of determining what is the lowest reasonable rate that will move and attract the traffic. Here the railroad respondents are seeking increases which far exceed variable costs. Accordingly, ratios of the increased rate to variable costs reflect up to 174 percent of variable costs, with the average at all weight minima originating in McAllen, Tex., being 133.6 percent of variable costs, and for those originating in Crystal City, Tex., 133.5 percent.

Since the new rates are so much more than compensatory, it is clear that the railroads are seeking to permanently impose far more than a compensatory rate level. They are imposing rates far in excess of the lowest reasonable rate that will move the traffic and attract it.

Moreover, while the cost presentation of the railroads in the instant proceeding was less than that made, but found wanting, by the Commission in the 1975 case, I & S Docket No. 8944, respondents concede that costs herein are predicated on representative origin points. In I & S Docket No. 8944, the Commission expressly found the use of representative origin points to be a determinative and fundamental costing error stating:

The most glaring deficiency in respondents' cost study is that the rates are based on so-called 'representative origin points.' (Emphasis supplied) Fresh Fruits & Vegetables, Transcontinental & Western Points, 350 ICC 228 at 287.

It is evident that respondents in the instant case repeated that fatal error, leading to the ultimate conclusion that the costs offered in support of the proposed rate are invalidly computed.

Moreover, there are apparently other aspects of respondent's costing methodology which conflict with methods accepted by the Commission. For example, respondents relied on a way bill sample prepared for the prior case based on 1973 traffic. This sample covered almost all perishable movements by six railroads covering transcontinental, western, and southwestern movements. Therefore, the "units" resulting therefrom may have no cogent relationship to just the southwestern movements involved here. Moreover, that way bill sample not only was not introduced into evidence in the instant proceeding, it was not even introduced in the prior proceeding for which it was prepared. As stated by the Commission in the 1975 report:

Respondents' traffic study is based on a ten percent traffic sample of all way bills ending in the number 1 for six Western Roads who originated perishable traffic in 1973. Respondents indicate these six railroads, Burlington Northern, Santa Fe, Union Pacific, Southern Pacific, Western Pacific and Missouri Pacific collectively originated...about 98 percent of the eastbound perishable traffic under consideration in 1973. Fresh Fruits & Vegetables, Transcontinental & Western Points, 350 I.C.C. 288 at 268.

* * *

Respondents did not submit the results of its traffic study. Id. at 286.

Without the study being of record no specific discussion of its development or utilization herein can be made, but its lack of direct representation of the southwestern movements and relationship to respondents seems obvious.

It also appears that respondents developed costs at various minimum weight categories without a showing that the average load and the minimum weight categories were equal. This was an approach also rejected in the same case wherein the Commission stated:

Additionally, respondents developed costs at various minimum weight categories which would be acceptable if the average load of this traffic and the minimum weight categories were equal. However, respondents have not shown this to be true. Accordingly, this oversight presents a deficiency in the respondents' presentation. It is our view that costs should be developed at the actual weight of the traffic, for it is the actual weight carried, that affects costs not the tariff minimum weight that should be carried. *Id.* at 287.

As to loss and damage claim costs, it appears that in the development of composite Rail Form A unit costs (July 1, 1976 level) respondents used a factor of 22.55 which was the highest for the various commodities, while substantially lower loss and damage figures apply to other involved commodities such as citrus and carrots. The use of the highest figure would thus overstate costs as purportedly reflected under the representations headed "Development of Composite Rail Form A Unit Costs"

Also, the record reveals there are still cars smaller than the 50-foot MPS car presently in the fleet, yet the Tare Weight utilized relates only to the largest car. This approach was rejected by the Commission in the prior proceedings, stating:

It would have been more appropriate for respondents to use the average tare weights of the cars handling each commodity... Additionally, protestants have pointed out that, different size cars handle different types of loads of perishable traffic: thus the different tare weights of the cars should be taken into consideration in costing out these movements. *Id.* at 290.

Finally, just a few days ago the Commission in Ex Parte No. 336 (Special Permission Order 77-1500) granted the railroads a 4 percent general rate increase which, obviously, bears upon this proceeding and the cost and revenue issues. Texas Growers respectfully request that official notice be taken of that development in considering the instant case.

What is clear, however, is that, in a variety of ways not even necessarily limited to those mentioned above, the carriers have developed their cost data pursuant to questionable methods and in a number of instances, methods which have been rejected by the Commission. Thus the costs have been invalidly computed and must again be rejected.

E. Hardship on Producers and Consumers

Quite properly, and consistent with its statutory and public policy obligations, the Commission has always considered, as a part of its decision-making process in cases of this kind, the ramifications of the proposal to growers, shippers, and consumers. The increases herein will have very great and debilitating ramifications in this regard.

At the outset it is important to note that the growing of vegetables in Texas is a financially marginal business which is becoming less and less profitable. The unfortunate result is that that industry is shrinking as vegetable growers either turn to more lucrative crops or to other businesses entirely. Thus, the viability of the vegetable growing industry is already endangered. Being one of the three primary vegetable growing areas in this country, the constriction

or reduced viability of this Texas industry would be a severe blow to those who operate the farms, those they employ, and the consuming public which depends on these crops for nutritional and healthful foods. In the words of one witness:

We have found there are fewer and fewer farmers who are willing to grow the vegetables to sell to us We know from our own farming operations the reason is that now you get a lesser amount of income from growing vegetables than you can get from some other crops. My point is that the increase in transportation charges cannot be passed back to the grower. He has reached the point to where the returns he would get from absorbing these additional costs would not make it worth his while to grow the vegetables or, in fact, would cause him to have actual losses. I am fully aware of this because we recently took acreage heretofore devoted to vegetable production, and converted it to the growing of other crops because we have not been able to make a profit growing the vegetables.

Fruits and vegetables are essential to a nutritionally sound diet. In its report in the prior proceeding the Commission characterized this nutritional factor as "important and relevant." Therefore, it would be contrary to the public interest for the Commission to approve the instant increases, which can only have the effect of threatening the continued viability of Texas growers and shippers. That in turn could reduce the availability of Texas fruits and vegetables to the consuming public. Such a result is clearly contrary to the concern expressed by the Commission in this regard.

Further, while ostensibly offering these rates as "incentive" rates, they are certainly anything but an incentive to Texas fresh fruits and vegetable growers and shippers. The theory of an incentive rate scale is that, because the charge per hundred-weight is less as more is loaded into a car, shippers will ship heavier loads in each car thereby producing a lower per unit cost-the theoretical "incentive". Thus, a shipper meeting a 90,000 pound minimum is paying less per hundred-weight than one meeting a 40,000 pound minimum. It is obvious then, that an incentive rate scale is meaningful only if the shippers can in fact load in heavy enough volumes to allow them to take advantage of the "incentive."

The facts are that Texas growers and shippers of fresh fruits and vegetables cannot, for the most part, "ship heavy", cannot take advantage of the "incentives," and thus are faced with the unavoidable reality of being locked into paying what has become outrageous rate increases attending the very lowest minimum weight brackets in the scale. This "fact of life" results primarily because of the physical nature of the products involved and the market realities which limit their rate of absorption. As stated by one witness:

Very few of the products we sell can be loaded as much as 40,000 pounds to the car Even when we are able to get 50-foot cars, we have trouble in loading much in excess of 40,000 pounds principally because of market conditions. On straight cars of cabbage, or carrots, we can load safely up to about 50,000 pounds. On cantaloupes, about the maximum safe load we can get is 40,000 pounds.

It is possible to load about 50,000 pounds of dry onions, but none of the other commodities can be loaded as heavy as 40,000 pounds. For instance, on straight carloads of broccoli in 50-foot cars, the maximum safe load is about 36,000 pounds. On mixed cars about the maximum weight that can be gotten into a 50-foot car is 35,000 pounds.

In making heavy loads, two things must be taken into consideration. First, the actual space of the car taken up by the packages being loaded Second, consideration has to be given to the effect on the commodity of being stacked too high, or being stacked so that virtually all of the space in a car is occupied by containers..

Some commodities require top icing which takes up space. The weight of the ice and the cartons can cause crushing. Sufficient room must also be left in the car to allow proper circulation of the refrigerated air. Improper circulation will inevitably cause product damage.

Not only are Texas growers and shippers effectively precluded from making any meaningful use of the higher minimum, but also they are injured by a rate scale whose very lowest bracket is 40,000 pounds. Texas growers would have to bear the full 40,000 pound rate, whereas many of the fresh vegetables require lower weight brackets that are not provided in the new rates. Thus, the new rate scale now deprives shippers of the 30,000 pound minimum bracket which they had available prior to September 15, 1976, and which is the minimum weight bracket at which most of those products can move. As stated by a witness:

... it is apparent to me that the rates the carriers now have in effect for minimum weights in excess of 40,000 pounds will be of little use to us in moving our products. As a matter of fact, we will have many instances where we will not be able to even load to the 40,000 pound minimum. This will increase the freight charges per container paid on our commodities because the cost of transporting this produce that only is loaded in the mechanical car to a total of 35,000 pounds or 36,000 pounds will be billed at the lowest minimum weight now available to us, 40,000 pounds.

Thus, the rate increase itself is dramatic to say the least. It cannot be absorbed by the farmers whose business is marginal at best. The effect of the increase is compounded because many commodities cannot be loaded even to 40,000 pounds. They will be obliged to bear the full and now greatly increased cost of 40,000 pound minimum rates. It is patently obvious that the marketability of these products by rail will be impossible.

Competitive factors must also be considered. While this increase raises rates definitively and provides minima beginning at 40,000 pounds, Florida shippers, with which Texas shippers directly compete, have the benefit of minimums beginning at 24,000 pounds. This seriously disadvantages the Texas shippers. The rate disparity as

between Florida origins and Texas origins is discriminatory, preferential, and prejudicial. The Florida scheme is attuned to the realities of the product and the marketplace. The Texas situation is not. A witness noted that:

It should be pointed out that most Florida vegetable rail rates are based upon loading in refrigerator cars that do not exceed 33' 6" in length, and carry low carload minimum weights of 20,000, 24,000 or 30,000 pounds. This in itself is a distinct advantage to the Florida vegetable industry as it enables them to make deliveries in much smaller quantities which is to the buyers advantage in that they receive shipments more often, thereby giving them a fresher product, reducing their storage expense and minimizing their losses in case of market declines.

There exist disproportionate and dramatic differences in hundred weight charges as between Florida, on the one hand, and Texas, on the other, to the great disadvantage of Texas. Texas growers and shippers cannot compete in the marketing of fresh fruits and vegetables when their competitors have such a marked rate advantage. The same witness pointed out that,

Transportation costs from Texas must be in fair relationship with the transportation costs from Florida and other producing and shipping areas if our industry is to have any opportunity for continued marketing in the heavily populated areas of the Central and Eastern United States. The cost of transportation is a most important factor and our customers in the terminal markets look very closely at those costs when they are deciding from whom to buy their produce.

While the railroads know that most of these commodities cannot be marketed in heavy loads, they blithely urge combined loading by more than one shipper. Their tariffs are so structured, however, as not to permit stops in transit within origin territory to complete loading. While co-loading is not the answer to many of the problems discussed herein, the carriers again belie their words by contrary actions, as is shown by the following dialogue:

Judge White: Also, is there any possibility of allowing -- I don't know whether it is only shippers associations that are involved, or whether you have small shippers, but is there the possibility of combining two or more shipments in one car?

Mr. Smith: That, sir, is, I think, a very pertinent question, and this is something that has concerned us very greatly over the years, because there are, we feel, many possibilities for co-loading and combining and sharing cars ...

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Mr. Kolins: It's interesting, given to what Mr. Smith just said in response to you, Your Honor, that the proposal provides for no stopping in transit to complete loading.

D. Diversion

This record is replete with the altogether reasonable forecast that this perishable traffic will be totally diverted away from the rails if this rate structure is allowed to continue in effect permanently. The choice between motor and rail transportation depends essentially on the respective quality and price of the service offered. Much of the transportation of fresh fruits and vegetables out of Texas is accomplished by motor carriage because the quality of motor service far exceeds that of the rails. While the respondents complain of only having a minor share of the traffic, they have taken absolutely no steps to in any way improve their service or secure equipment suited to the needs of the shipper despite the conceded fact that service considerations are vital to the transportation of perishable commodities.

Thus, the poor quality of rail service is being allowed to languish in the squalor of reduced use that it has created while, commensurately, the price for that "service" is now inflated beyond reason. The actions of the rail carriers are a conscious attempt to free themselves from this traffic by poorly serving it regardless of the growers' and shippers' needs. There is testimony that the rates now in effect make the railroads an even less attractive alternative than previously, but their poor service and lack of accommodation to shippers also have contributed greatly to their not enjoying larger portions of the traffic. Inconsistent and slow transit times on perishables made the railroads less attractive and their seeming lack of interest also contributed to their loss of business. The railroads require that each car placed at a shipper facility be billed out by 7:00 p.m. each evening. Yet the produce is harvested during the day and packed at night making it physically impossible to load the car by 7:00 p.m. Shippers therefore must load a car after 7:00 p.m. and then hold it over until 7:00 p.m. the following day before it can be billed out. The railroads continue to follow this procedure.

Shippers would prefer to ship by rail if the price were competitive and the service satisfactory. It is easier for them to load a rail car than to prepare the merchandise for truck shipment and then wait for the trucks to arrive. Shippers would find their working day shortened and their task simplified if they could utilize rail more often. Although one shipper's facility, was built in 1958 especially to accommodate rail carloading, the railroads, in its judgement, have turned this shipper away.

There is thus a need for rail service, in the transportation of perishables and the railroads should be precluded from what appears to be a systematic discontinuance of their service. The railroads should attempt to attract the traffic before being heard to cry that they are not wanted or needed. The Commission's report in I & S Docket No. 8944 dealt with precisely the same issues that are manifest in this proceeding. There, the Commission found the rate increase on fresh fruits and vegetables from Texas, among other origins, to be unjust and unreasonable. The rationale of the report is fully appropriate to the instant case for there has been no discernible change in circumstances. It reads:

The second reason for the stated finding of the decision and order is that the proposed rates would largely eliminate the use of railroad transportation

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on many of the considered commodities with extreme hardship on the producers and consumers of such commodities. That transportation of much of this traffic by railroad has, even at existing rates, been rapidly diverting to trucks is documented at some length in Appendix B. It seems evident to us that rate increases such as proposed here will complete the process for many commodities Texas shipments of nearly all fresh fruits and vegetables, will, judged by recent trends, be diverted to trucking, if transported at all

The ultimate effect of the proposed rates and rising truck costs on the rail-motor competitive situation is impossible to forecast precisely, but the conclusion is inescapable that the truckers will gain a further advantage in handling this traffic that they would not otherwise obtain, if the rail rates are increased as proposed. The position of the railroads on this situation is one of resignation - if they cannot handle the traffic at the rate level here proposed they would prefer not to handle it

The immediate effect of the proposed rates, covering as they do a large portion of the exempt commodities shipped, would likely be a shortage of trucks with consequent rate increases and rate instability. This will impose a hardship on shippers and render difficult orderly and timely marketing of these commodities

This would have a detrimental effect on producers. Because of narrow or non-existent profits in vegetable profits in vegetable production, a number of producers in Texas have already ceased production of the considered commodities. Other producers are seen by the industry as following if the proposed rates become effective. (Emphasis supplied). Fresh Fruits & Vegetables, Transcontinental & Western Points, supra p.p. 233-243.

In its related conclusion the full Commission, while arguing generally with the notion that rates should be compensatory, stated at p. 237.

But we cannot agree that, in view of the described ramifications of discontinued rail transportation of these commodities, that their participation or non-participation in this traffic should be decided by the rate level here proposed. We believe that the railroads, without detriment to their industry, and with great benefit to the producers and consumers of this country, can transport the traffic at rates below those proposed here.

Those words and that entire rationale applies to the instant case precisely as it applied to the prior proceeding: Each and every concern manifested there by the entire Commission is evident in the instant proceeding. As was true therein also, continued approval of the rates here at issue, as shown by the record, will have the effect of:

1. largely eliminating the use of railroad transportation on many of the considered commodities;

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2. causing extreme hardship on the producers and consumers;
3. virtually completing the process of diversion away from rails;
4. diverting to trucking nearly all Texas shipments, if they are transported at all;
5. giving the truckers further advantage in handling this traffic than they would otherwise obtain;
6. verifying the position of the railroads as one of resignation, in that they want the traffic at the increased rate or not at all; and
7. causing a shortage of trucks with consequent rate increases and rate instability.

The ramifications of the increase will be the same as served to persuade the entire Commission in the prior proceeding that the proposed increases had not been shown to be just and reasonable.

DISCUSSION AND CONCLUSIONS

Respondents request the Commission to find on the basis of the evidence presented (1) that the rates in issue have been shown to be just and reasonable, (2) that the railroads do not have market dominance for the traffic movements involved, and (3) that the request of LIRR for a prescription of increased rates to LIRR points should not reasonably be considered in this docket, as the request is essentially a divisions dispute which should be adjusted under other more appropriate procedures.

The standards of the Railroad Revitalization and Regulatory Reform Act of 1976, which was enacted February 5, 1976, are controlling. Respondents urge that upon finding that the changed rates are reasonably compensatory and that the railroads do not have market dominance, the law (4-R Act) now requires a further finding that the rates are just and reasonable. This is true. The railroads now have extremely liberal standards to meet in the establishment of new or changed rates, but while the Commission's hands appear to have been effectively shackled in certain respects, it is not completely impotent. There remains a small residue of power to protect the public interest. Thus it is said to be the "policy of the Congress in this Act to (1) balance the needs of carriers, shippers, and the public and (2) to foster competition among all carriers by railroad and other modes of transportation, to promote more adequate and efficient transportation services" Respondents rely specifically upon the sentence in section 1(5)(b) of the 4-R Act which reads, "Notwithstanding any other provision of this part, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate exceeds a just and reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such a service." Market dominance is defined as "an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies."

The proposed level of rates herein at 133 percent of variable costs is lower than the scale of rates found to be unreasonably high in Fresh Fruits & Vegetables, Transcontinental & Western Points, SUDRA, frequently referred to herein as the prior proceeding.

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Whatever deficiencies may exist with respect to respondents' cost computations, no one would seriously question that this level of rates does exceed variable costs and is compensatory. Coupling this conclusion with the concession by protestants that the railroads do not have market dominance in a market 85 percent captured by motor carriers, the 4-R Act requires the conclusion that the rates in issue are just and reasonable under section 1(5)(b) of the Act. The Judge so conclude and accordingly grant requests (1) and (2) of respondents.

Request (3) of respondents will be denied. Aware of the diminished character of the Commission's powers to protect the public interest under the new 4-R Act, the LIRR prays the Commission to find the rates under investigation to be unlawful in violation of Sections 1(5), 1(6), and 3(1) of the Act, and that the rates be ordered cancelled, without prejudice to the republication on 30 days' notice of such rates and related or alternative rates to points on the LIRR which, when combined with LIRR's surcharge, will make the total transportation charges paid by LIRR receivers the same as those paid by the other receivers in the New York City rate group. Ruling has been made for respondents under section 1(5) as required by law, but it is an unreasonable practice under section 1(6) which results in rates unduly prejudicial to New York area shippers and unduly preferential of other shippers in the same rate group for respondents not to make allowance for the 12½ percent surcharge approved by this Commission for LIRR points in Ex Parte No. 299 (Sub-No. 1) Increases in Freight Rates and Charges - 1973, supra. The petition for reconsideration of those carriers objecting to the special consideration given the LIRR was denied by order of the Commission served December 9, 1976. The determination is therefore administratively final and must be complied with by respondents herein. As pointed out by intervenor, pertinent sections of the 4R Act which are controlling are Sections 15(8)(f)(1) and (4), which read:

(f) Nothing in the amendments made by this section shall be construed -

(1) to modify the application of section 2, 3, or 4 of the Interstate Commerce Act (49 U.S.C. 2, 3, or 4) in determining the lawfulness of any rate or practice;

-

(4) to affect the authority and responsibility of the Commission to guarantee the equalization of rates within the same port.

Protestants seek the reinstitution of rates in effect prior to September 15, 1976. That cannot be under the provisions of the 4R Act. The proposed rate level so far as it goes is just and reasonable under the revised standards of section 1(5). It is necessary to look at the situation from a practical standpoint before it is realized that the rate scale under investigation almost certainly is constructed of paper rates that will move no traffic. The reality of the situation is that most of the fresh fruits and vegetables move in the weight category between 30,000 and 40,000 pounds. To initiate a scale of rates relative solely to minima 40,000 pounds and above will result in the total diversion of the traffic from the rails. The rails are deliberately pursuing a policy of withdrawal from common carriage. They intend to become specialized haulers. The proposal therefore is in effect and in fact an embargo on the movement of all perishables

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traffic from Texas. Unless a weight category is established at 30,000 pounds, reasonably related to market and competitive factors, none of the traffic will continue to move by rail. Even at a minimum weight of 30,000 pounds, the application of the privilege of stopping transit to pick up the perishables of small shippers unable to meet this realistic minimum weight is a catastrophe.

The actions of the railroads in terms of transporting fresh fruits and vegetables are unconscionably hypocritical. They claim to want the business of hauling perishables, while at the same time their every action represents a disaccommodation to the needs of the shippers and the commodities themselves. The record clearly shows that, by their own conscious decisions and actions, and in absolute contrast to the conditions attendant to this type of transportation, the railroads have (1) virtually eliminated all but the very large MPS cars for perishable goods, (2) taken absolutely no steps to improve the quality of their service on these commodities, (3) have now priced their service beyond the reach of shippers who must offer their products at a marketable price, (4) have instituted a rate scale out of Texas which puts Texas growers and shippers at a serious competitive disadvantage as compared to their competitors in other locations including the principal Florida competition, (5) have instituted an "incentive" rate scale which, as the record shows they fully realize, offers "incentives" only at and above 60,000 pound minima which are beyond the loading capacity of most of the involved commodities and beyond marketable sizes for virtually all, (6) have proposed a rate level which exceeds the prior effective rates by as much as 87 percent; (7) are following the same practices previously condemned by this Commission in the prior proceeding, (8) have by this action, virtually assured the maximum diversion of the traffic to motor carriers, and (9) have assured the full gamut of utterly unnecessary and excusable hardships on producers and consumers described above and roundly rejected by this Commission in the prior proceeding.

Clearly, the carriers have given no consideration to the economic impact the new increased rates will have on the fresh fruit and vegetable grower and shipper, and the conclusion is inescapable that the increase will impede the overall national recovery from the recessionary economy of recent years, and work a major hardship on consumers generally.

Under such circumstances the Judge finds no difficulty in concluding that the rail respondents are herein guilty of implementing an unreasonable practice. It is true that under existing practice the mere showing of a lower level of rates for a competitive area, such as Florida, does not demonstrate undue prejudice to Texas and undue preference to Florida in violation of section 3 of the Act, but it is a factor to be considered as supportive of the section 1(6) violation. It may even be necessary under the provisions of the new Act that experience will dictate liberalization of the traditional requirements of proof in regard to undue prejudice and preference.

It is truly unfortunate that protestants and respondent were unable to take advantage of the time allowed them at the hearing by the Administrative Law Judge in an effort to reconcile their differences and reach agreement on an acceptable level for a realistic rate at 30,000 pounds minimum calculated to move the traffic with resulting benefit to all concerned. The matter has been left to Commission prescription, therefore, and the Judge now concludes that the proposal under

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investigation should be further supplemented by publication of rates taking a 30,000 pound minimum weight set 10 percent higher than the 40,000 pound rates approved herein as just and reasonable. Additionally a provision for stopping in transit to pick up a minimum of 10,000 pounds at 3 or more stops will also be necessary in connection with the new 30,000 pounds minimum weight, if new shippers are to be induced to use rail carriage of fresh fruits and vegetables from Texas origins to the considered destinations.

FINDINGS

Consistent with the above conclusions, the Judge finds that the rates under investigation are just and reasonable, but that they constitute an unreasonable practice in violation of section 1(6) and have been shown to be unduly prejudicial and preferential in violation of section 3(1) of the Act to the extent that (1) the said rates and related or alternative rates to points on the LIRR, when combined with LIRR's surcharge, do not make the total transportation charges paid by LIRR receivers the same as those paid by the other receivers in the New York City rate group, (2) do not include a rate level taking a 30,000 pounds minimum weight prescribed herewith as 10 percent above the 40,000 pounds rates herein found just and reasonable, and (3) do not include the privilege of stopping in transit to pickup 3 or more not less than 10,000-pound lots to build a minimum carload of 30,000 pounds.

It is the ORDER of the Administrative Law Judge that the respondents herein be, and they are hereby, notified and required to cancel the schedules described in the order entered in this proceeding on September 14, 1976, by Division 2, on or before 35 days from the date of service of this report and order, upon not less than 1 days' notice to this Commission and to the general public, by filing and posting in the manner prescribed by the Commission under section 6 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

And it is further ordered, That, unless stayed by the Commission on its own motion, or by the timely filing of exceptions pursuant to the Commission's General Rules of Practice, this order shall become effective as the order of the Commission 20 days from the date of service hereof.

Dated at Washington, D. C., this 7th day of February, 1977.

Warren C. White
By the Commission, Warren C. White, Administrative Law Judge.

ROBERT L. OSWALD,
Secretary

(SEAL)

55a

Exceptions of Respondents (other than the Long Island
Rail Road Company) to Limited Decision.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 36432

FRESH FRUITS AND VEGETABLES,
FROM THE SOUTHWEST

EXCEPTIONS TO INITIAL DECISION

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DUE DATE: March 16, 1977

PRELIMINARY STATEMENT

This proceeding involves an investigation (without suspension) into revised rates on fresh fruits and vegetables from the Southwest published effective September 15, 1976 to destinations in the Midwest, East, and South.

The Initial Decision of Administrative Law Judge Warren C. White concludes that the railroads do not have market dominance for the traffic under consideration; that the rates under investigation are just and reasonable, but that they constitute an unreasonable "practice" in violation of § 1(6) and have been shown to be unduly prejudicial and preferential in violation of § 3(1) to the extent that (1) the rates to points on the Long Island Rail Road, when combined with the Long Island Rail Road local surcharge, do not make the total transportation charges paid by LIRR receivers the same as those paid by other receivers in the New York City group; (2) do not include a 30,000-pound minimum weight rate "prescribed herewith as 10% above the 40,000-pounds rates" and (3) do not include the privilege of stopping in transit to pick up three or more lots of not less than 10,000 pounds each.

In short, the Administrative Law Judge found that the railroads did not have market dominance of the traffic

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in issue. He nevertheless proceeds to prescribe increased rates to destinations on the Long Island, reduced rates for light loading vegetable shippers and, in effect, drastically reduced rates should anyone desire to make split pick ups for these rail shipments of fresh perishables. In making his prescriptions of increased and reduced rates, the Administrative Law Judge departed from the record, departed from the legal standards applicable under the Interstate Commerce Act, to impose his own notions of abstract justice. In the process, the Administrative Law Judge's initial decision demonstrates patent error.

Exception No. 1:

To the prescription of three or more stops in transit in connection with the rates reviewed and approved, or prescribed.

Argument:

In his discussion, the Administrative Law Judge concludes (Sheet 34):

"... Even at a minimum weight of 30,000 pounds, the application of the privilege of stopping in transit to pick up the perishables of small shippers unable by themselves to meet this realistic minimum weight is a categorical imperative."

The sole basis for this "categorical imperative" is the Judge's interpretation of a colloquy between the Judge

and counsel recounted at Sheets 29 and 30, concerning co-loading of rail cars.

We want to make it crystal-clear that there is no shipper evidence whatsoever of any need for stopping in transit to complete loading of rail cars. We emphasize that the shipper evidence shows no need, no desire, and no interest whatsoever in stopping in transit to complete loading.

The rail carriers have for a number of years encouraged co-loading of the mechanical refrigerator cars, whereby two or more shippers will jointly load a car going to a major metropolitan market, such as Chicago or New York. The railroads have also encouraged the growth of mixed shipments, whereby a single house will load a car consisting of a number of different types of fresh perishables to a particular market. Thus, although an individual market might not absorb a full carload of, for example, parsley, parsley is compatible with a large number of leafy green vegetables and could be loaded in mixed shipments with other vegetables going to a particular destination.

What is not practical, however, is stopping a rail car in transit to complete loading of fresh perishables. Speed is of the essence in transporting fresh perishables.

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There are intimations, at least, on the record that the shippers would like even faster rail transit times than they presently have available. It takes time to pull a rail car from the packing shed, inspect it, make up the train, transport the car to another station, set it out, spot it at the second shipper's shed, pull the car at the end of the day, take it to the yard, make up a train, take it to the next station and the third shipper, etc., until the car is loaded. Simply stated, stopping in transit to complete loading for fresh perishables would add so much time to the overall journey that it is doubtful what value, if any, the rail transportation mode would have for shippers.

This is why there was no shipper evidence of any need for stopping in transit, and, in fact, the only shipper evidence on the subject was that there was no need for split pick ups. The witness from J. S. McManus Company testified that the motor carriers had the capability of making split pick ups, but that they didn't use it, preferring to consolidate mixed loads at their own packing shed (Tr. 181).

The Administrative Law Judge's conclusion that split pick ups should be prescribed is totally without evidentiary support in the record, and is not supported by substantial evidence. It stems solely from a notion of

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his own which has no basis in reality. The practical fact of the matter is that the less carload shippers, for whom the Judge expressed such great concern, cannot make effective use of rail service in shipping fresh produce unless an effective means of co-loading is employed. The Judge's "solution" marches in exactly the opposite direction, pyramiding the costs of rail service and slowing the overall transit time until the resultant service would have no commercial utility to a fresh perishable shipper.

Exception No. 2:

To the conclusion that a new scale of 30,000-pound rates must be published 10% higher than the carrier's 40,000-pound rates.

Argument:

The Administrative Law Judge prescribed the publication of a scale of 30,000-pound rates 10% higher than the carrier's 40,000-pound rates. It is important to note that the Judge did not find that the failure to include a scale of 30,000-pound rates was an unreasonable practice; the Judge went further and decided what maximum reasonable rates at the 30,000-pound level ought to be. This, having concluded that the rail carriers do not have market dominance for this traffic, was patently beyond his authority.

The background for the controversy is this. Some of the rail shipments formerly made from Texas under the prior rates consisted of cars of light loading vegetables. The out-of-pocket losses were horrible. Exhibit 3, page 13, gives representative examples of losses under the old rates; to New York City, the major destination, the 20,000-pound rates produced charges which were only 52% of the Rail Form "A" variable costs for the movement; the 30,000-pound rates produced revenues which were 68% of the variable costs; and the 40,000-pound rates produced charges which were only 72% of the variable costs for the entire movement. Thus the per-car charges under the prior rates had to virtually double, in some instances, to even reach the variable cost "floor".

While the revenue-cost comparisons shown on page 13 of Exhibit 3 show the revenue-cost results for transporting from the Winter Garden district of Texas, the fact is that the revenue-cost comparisons from the lower Rio Grande Valley were even worse under the prior rates. From McAllen to New York City, the prior rate of 385¢ at 30,000 pounds for vegetables (Exhibit 9, pg. 8) contrasted with an out-of-pocket cost of 582.3¢ (Exhibit 4, pg. "New York"), for a revenue-cost ratio of 0.66.

The old 20,000, 25,000 and 30,000, etc., rates were destructive, noncompensatory, and contrary to the public

interest. The elimination of these losses is not only in the public interest, but is virtually mandated by the legal requirements of the 4R Act. This is implicit in the new language in § 1(5)(b) that -

"Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going-concern value of the proponent carrier to a level which contributes to such going-concern value and is otherwise just and reasonable."

Thus while, prior to the 4R Act, the Commission arguably had authority, in special cases, to require the carriers to transport perishables at a charge below variable cost, it seems clear that any such authority was removed by the revisions to the rules of ratemaking in the 4R Act. Thus, at the outset, the light loading vegetables necessarily faced increases in per-car charges of up to 100% just to reach the variable cost level.

The rail carriers designed a new scale of rates starting at 40,000-pounds, on the assumption that the per-car charges required to provide an adequate contribution over variable cost would be so great, if expressed at 20,000- and 30,000-pound minima, that they would be of little practical utility to shippers. As explained in the initial decision at pages 8-11, the variable costs of transportation do not vary directly with the load in the car but, on the contrary, are in large part independent of

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the actual net load in the car. Thus a reduction in net load from 40,000 to 30,000 pounds, or 25%, produces a variable cost reduction of less than 4%. The protestants obviously wanted 30,000-pound rates which produced per-car charges substantially below those produced by the 40,000-pound rates, but the cost saving to support any reduction of that magnitude is simply not there.

The Administrative Law Judge interjected himself into this situation and assumed the mantle of mediator, urging the parties to come together under his aegis and reach a satisfactory conclusion as to the publication of a 30,000-pound scale of rates (Tr. 199-214; 241-250). Not receiving a satisfactory answer on the record, the Judge, assuming arbitrator's powers, decided what he thought would be good for the railroads and the shippers. He concluded -- and this is wholly without any support in the record -- that a 30,000-pound rate 10% higher than the 40,000-pound rate sounded about right to him, and that is how the prescribed scale of 30,000-pound rates was arrived at.

In this process the Judge committed multiple error.

The first error concerns the fundamental exercise of the Commission's authority. Having concluded that the rails lacked market dominance, the Judge is precluded from prescribing a scale of maximum reasonable rates. Assuming,

arguendo, that he may properly conclude that it is an improper practice to fail to provide a scale of 30,000-pound rates, directing the carriers to publish such a scale, it does not follow that the Judge may go further and state what a maximum scale would be for the carriers to publish.

The second error concerns the total lack of evidence in the record that the rate which the Judge would prescribe would be of any use to anyone, or would meet any stated need of the shippers. The Judge totally ignored what he was told on the record by the shippers, namely, that a 30,000-pound rate which produced per-car charges in the same range as those produced by the 40,000-pound rates would be of no help whatsoever (Tr. 187-191) and that the most the shippers could "live with" and still ship rail under a 30,000-pound rate would be a 35% increase over the prior rate (Tr. 217). To New York, which is the illustrative destination used throughout the cross-examination and consequent discussions, a 35% increase on the prior rate would result in a 30,000-pound rate of \$5.20 (Tr. 221). Even the practical value of such a rate appeared to be questionable, in view of the fact that, for these light loading commodities, the truck rate could then well be lower (Tr. 221).

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The rate "prescribed" by the Judge at the 30,000-pound level to New York would be 574¢ plus 10%, or 631¢. The Judge's maximum reasonable rate is thus 21% more than the shippers claim is the most they can live with, and appears to be well above the going rate for the motor carriers. There is no evidence whatsoever in this record that the rate prescribed by the Judge would move one car of perishables at any time, to any destination.

The plain fact of the matter is that the variable costs of handling a 30,000-pound load to New York City are \$1,746.90 per car (See initial decision, pg. 9) and the shippers are willing to pay only \$1,560 per car, or a revenue-variable cost ratio of 0.89. This is an unreasonably low rate. The railroads are not willing to dissipate the resources of their industry in transporting below cost, and the Judge's ill-chosen remarks about the railroads' refusal to publish 30,000-pound rates which the shippers will continue to use is just without warrant in the record.

The inescapable economics of the situation are that the motor carriers are obviously the lower-cost haulers for the light loading vegetables in the 30,000-pound range. There is not one stitch of evidence in this record to suggest that the rate prescribed by the Judge would ever move a solitary rail car, and there is no

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evidence whatsoever that the rate prescribed by the Judge would meet any stated public need.

The Judge makes it clear that the 30,000-pound rate which he prescribes should be used in connection with the prescribed stopping-in-transit privileges in order to handle small loads by rail (initial decision, pg. 34).

He makes no findings whatsoever as to what the cost-effect of such an action would be, although the record contained sufficient cost evidence to put the Judge on notice that the prescription of expensive additional services, in conjunction with a revenue reduction of the magnitude which he has directed, could well result in non-compensatory transportation. And, in fact, it does.

The 30,000-pound rate prescribed by the Judge to New York is, as previously noted, 631¢ per hundred pounds, producing total per-car revenues of \$1,893. The variable costs for a non-stop, non-transit, movement, are recognized as \$1,746.90 (initial decision, pg. 9). There is a margin of \$146.10 between rate and variable costs. Two additional in-transit stops, if added, with consequent additional switching, way-train mileage, terminaling expense, additional per diem for the equipment for several days, etc., will consume that thin margin and

much more besides. The result: Non-compensatory transportation ordered by the Judge, and this is a power and an authority that he does not have.

Having attempted to prescribe a rate with a revenue-variable cost ratio of 1.08 (the 30,000-pound rate to New York), it should have been apparent that any expensive transit services would promptly throw the prescribed rate into the loss column. The Judge nevertheless prescribed the expensive in-transit services without giving any consideration to their cost effect, either separately or in conjunction with the new scale of rates which he would prescribe.

While we do not fault the Judge's desire to be helpful, nor his concern for the rights of shippers, neither justifies abandoning all the reference marks in the record and striking out cross-country, free of jurisdictional constraints, to produce an experimental rate structure which is not founded on evidence in the record but simply appeals to the Judge's inherent sense of equity.

Exception No. 3:

To the Administrative Law Judge's intemperate, unjustified, and unsupported criticism of the rail carriers at page 34 of the initial decision.

Argument:

At page 34 of the initial decision, the Administrative Law Judge waxes eloquent in bombastic condemnation of the railroads for a series of grievances which exist only in his imagination. This language commences with the statement:

"The actions of the railroads in terms of transporting fresh fruits and vegetables are unconscionably hypocritical. ..."

And continues to the end of the next paragraph:

"... and work a major hardship on consumers generally."

The foregoing language is not only unsupported, it is just out of touch with reality. The evidence is clear that the fresh fruits and vegetables from Texas move, in the overwhelming majority, by truck. How, then, does the level of rail rates, which are largely not used, "impede the national overall recovery from the recessionary economy"?

The instant adjustment results in large percentage increases in the lower weight brackets because the prior rates were grievously noncompensatory. It is our National Transportation Policy, expressed in the 4R Act, that non-compensatory railroad rates be eliminated. The Judge obviously disagrees with this policy, for he is shocked that the railroads increased their prices beyond what the Texas shippers want to pay. Now the Judge is entitled to

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his own private opinion, but when acting in his official capacity, he is obligated to follow the statutes, and he has obviously not done so. The Judge's individual numbered findings in the paragraphs objected to are not supported by substantial evidence and are contrary to the record.

All of the foregoing is predicated upon the Judge's impression of the protest of a single shipper group, the Texas Citrus and Vegetable Growers and Shippers Association. Unbeknownst to the Judge, and unbeknownst to the rail carriers, it appears that this shipper group has for years been conspiring with the motor carrier brokers operating in Texas to fix and manipulate the rates for truck transportation. The Commission may take official notice that on February 18, 1977, the United States Department of Justice filed an action in the United States District Court for the southern district of Texas, Brownsville Division, No. B-77-41, United States of America v. Texas Citrus Citrus and Vegetable Growers and Shippers and Greater Texas Motor Transportation Broker Association, alleging violations of the Sherman Antitrust Act, asserting that "beginning at least as early as 1969" the defendants engaged in a conspiracy consisting "of a continuing agreement, understanding, and concert of action ... to fix, stabilize, and maintain the rates to be paid for the

interstate transportation of fresh produce by motor carrier from a lower Rio Grande Valley" with the result that "rates for interstate transportation of fresh produce by motor carrier ... have been fixed, stabilized, and maintained at artificial and non-competitive levels".

A copy of the Department of Justice complaint, which we ask the Commission officially notice, is attached hereto as an appendix to the exceptions.

The overwhelming majority of the produce transported from Texas moves by truck. If the transportation charges are so high as to cause hardship to consumers, as the Judge apparently believes has happened, the answer lies, not in the rail rates, but in the existence of an apparent conspiracy to fix and maintain truck transportation rates at artificially high levels (See appendix). The Judge's anger was directed at the wrong side of the counsel table.

Exception No. 4:

To the Judge's finding that the rates involved violate § 3(1) of the Act.

Argument:

The finding that the rates violate § 3(1) of the Act is clearly error. It is unsupported by the record, by the statement of the evidence in the initial decision, or by any comprehensible legal analysis.

In the headnote and in the findings of the initial decision, it is stated that the rates under investigation violate § 3(1) of the Act. The finding is totally unsupported by evidence, is unaccompanied by any legal analysis or discussion whatsoever, and is completely at variance with governing law. It does not exaggerate or exceed the bounds of propriety to say that the § 3(1) finding is made without reference to fact, logic, or law.

The specific holding is that the rates -

"have been shown to be unduly prejudicial and preferential in violation of section 3(1) of the Act to the extent that (1) the said rates and related or alternative rates to points on the LIRR, when combined with LIRR's surcharge, do not make the total transportation charges paid by LIRR receivers the same as those paid by other receivers in the New York City rate group, (2) do not include a rate level taking a 30,000 pounds minimum weight prescribed herewith as 10 percent above the 40,000 pounds rates herein found just and reasonable, and (3) do not include the privilege of stopping in transit to pickup 3 or more not less than 10,000-pound lots to build a minimum carload of 30,000 pounds." (Initial Decision, p. 35)

This constitutes an unsound and improper § 3(1) finding in every respect.

The law has long been firmly settled that a violation of § 3(1) may not be merely wished into existence and that it is not enough merely to say that § 3(1) unlawfulness exists; it must be shown by clear evidence of record. In the recent case of Louis Dreyfus Corp. v. Burlington Northern,

Inc., Docket 35913, Initial Decision served February 20, 1976, summarily affirmed February 3, 1977, the following discussion appears at page 16 of the Initial Decision:

"As held in numerous Commission proceedings, to support a finding of a violation of section 3(1) of the act, it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the defendant carriers are the common cause of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions.

* * *

"As to item (2), it is well settled that a mere difference in rates does not constitute undue preference and prejudice and that inferences or assumptions are of no value. Undue prejudice cannot be predicated upon the mere existence of a difference in rates and some evidence of competition; the record must show that the rate disparity has operated to the complainants' disadvantage in the marketing of their products." (Initial Decision, p. 16)

This statement represents the unbroken and uniform position of the Commission as to § 3(1) in innumerable cases. As examples, see Soybeans & Wheat, Arkansas & Louisiana to Louisiana Ports, 341 I.C.C. 898, 903 (1972); Black Hills Glass & Mirror Co. v. Chicago, M. St. P. & P. R. Co., 313 I.C.C. 333, 339 (1961); United States Lime Products Corp. v. Atchison, T. & S. P. Ry. Co., 288 I.C.C. 293, 300 (1953); Cinder Concrete Products, Inc. v. Colorado & S. Ry. Co., 279 I.C.C. 191, 194-5 (1950); A. C. Jensen Block & Supply Co. v. Chicago, M. St. P. & P. R. Co., 273 I.C.C. 399, 401 (1948).

Naturally, in addition to the necessity of such evidence being offered and appearing of record, the existence of such supporting facts must be found by the Administrative Law Judge in the initial decision.

Rate Disparity. In this proceeding there is no evidence of rate disparity, nor was such a finding made by the Administrative Law Judge. In particular the Judge did not find that the rates under investigation apply differently to LIRR points than to other points in the New York City rate group. Neither did he find that whatever prejudice exists as to LIRR receivers results from these rates rather than from the LIRR surcharge. Without such evidence and findings, no conclusion that these rates are unlawful within the meaning of § 3(1) is possible. The evidence of record, to the contrary, establishes clearly that the rates under investigation were published even-handedly to all points and that the tariff contains no unlawful rate disparities whatsoever. While the LIRR's own action in refusing to join may indeed have certain § 3(1) implications with regard to its own receivers, no § 3(1) unlawfulness exists by virtue of the tariff under investigation in this case, and no § 3(1) finding is possible on this record as applied to the tariff under investigation.

With regard to the 30,000-pound minimum weight and the absence of a privilege of multiple stops for loading, no evidence exists of record that any such minima or stopping privileges apply to movements from points as to which rail tonnage moves in competition to rail tonnage from this Texas origin territory. Therefore, a finding that the absence of a 30,000-pound minimum weight and the loading stop privilege is prejudicial, let alone unduly prejudicial, to the Texas shippers, is not possible. The only other origin territory mentioned in the initial decision is Florida. But, while in the discussion and conclusions the Judge [at item (4)] finds that Texas rates place the Texas shippers at a disadvantage to Florida shippers, no finding is made that the disadvantage is undue in a recognized legal sense, or that any undue disadvantage results from the minimum weight or the absence of a multiple loading stop privilege. Even as to the finding on the rates, the Judge does not specify the exact nature of the disadvantage or the extent to which overall rates from Texas differ from those from Florida origins.

Injury. The Administrative Law Judge cites no evidence whatsoever in the record (there is none) and makes no finding to the effect that Texas shippers or any receiver on the LIRR are competitively injured actually

or potentially by the tariff provisions under investigation. As held in numerous cases, including those immediately previously cited, and in other decisions, including Schenley Distillers, Inc. v. Cincinnati, N. O. & T. P. Ry. Co., 300 I.C.C. 331, 334 (1957); Pie Bakeries, Inc. v. Railway Express Agency, Inc., 225 I.C.C. 171, 174 (1937); and Institute of Scrap Iron & Steel, Inc. v. Akron, C. & Y. R., 316 I.C.C. 55, 67 (1962), it is necessary that the record show and that the finding be made that the allegedly prejudiced party is handicapped in the sale of its products by the difference between the rates it must pay and those available to its competitors. Such a showing must be proven by "clear and unmistakable evidence". A showing sufficient to satisfy this requirement may not be of a general nature. "Inferences and assumptions are of no value", Louis Dreyfus Corp., supra, and an actual commercial disadvantage and injury must appear and be found.

The record in this proceeding establishes beyond any doubt that no such commercial disadvantage exists. Protestant Texas Shippers concedes that rail service is employed only to a limited extent, and no evidence of lost business as a result of being handicapped in marketing was shown to have followed from the publication of the tariff provisions under investigation. Injury was not proven by convincing or unmistakable evidence as required, and no

§ 3(1) finding of unlawfulness is possible for this reason as well.

With respect to injury that may be imagined to exist to receivers at points on LIRR, no finding was made and no evidence exists in the record that injury does or could result from these rates and practices. The law has long been clear, moreover, that when rail customers at points alleged to be prejudiced do not complain and send no witnesses to a hearing to testify as to injury, no basis exists for a finding that such persons are unduly prejudiced, Northwestern Leather Co. v. Director General, 69 I.C.C. 425, 426 (1922); and the mere assertion by the Long Island Rail Road which has hardly an independent and objective stance, that such injury exists, without the provision of detailed and convincing evidence, will not suffice. Athletic Mining & Smelting Co. v. Atchison, T. & S. F. Ry. Co., 142 I.C.C. 667, 671 (1928); Acme Coal Co. v. Baltimore & O. R. Co., 136 I.C.C. 286, 289 (1927). In addition to the obvious fact that LIRR claims do not establish specific evidence of injury to receivers, even general statistics as to actual or potential injury are missing from this record.

Control or Common Cause. No evidence exists in the record and no finding was made to the effect that the tariff provisions under investigation herein, which are

alleged to be prejudicial to Texas protestants, and under common control of carriers controlling allegedly preferential rates from other points. Even if common control were found to exist in certain instances, no § 3(1) unlawfulness could be found solely on this ground.

Transportation Conditions. No evidence exists in the record and no finding was made by the Administrative Law Judge that the transportation conditions from Texas origins are substantially similar to transportation conditions from any other allegedly preferred points. The burden upon protestants of showing such similarity, Soybeans & Wheat, Arkansas & Louisiana to Louisiana Ports, 341 I.C.C. 898, 903 (1972); Limestone from Bessemer, Ala. to Miss. Points, 316 I.C.C. 383, 388 (1962); Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co., 234 I.C.C. 569, 575 (1939), was not discharged. All evidence of record, to the contrary, points to wide differences in transportation conditions, both geographically and mechanically. The allegedly preferred territory is generally that of Florida vegetable and citrus origin points. Shipments made from that territory to the major Eastern markets cannot be presumed to be made under circumstances similar to shipments from Southwestern Territory to the same markets. The record clearly established in this proceeding that distances, rail carriers, and even commodities from the two territories

differ widely. If any similarity existed, it was shown to be that in neither territory do the shippers rely on rail service in any meaningful sense whatsoever.

In addition to the foregoing reasons, no finding of unlawfulness under § 3(1) should have been made in this proceeding because no evidence was introduced and no finding was made that competition exists between Florida shippers and Texas shippers to the major Eastern markets on traffic moving by rail. It is, therefore, not possible to find that a rate difference between the two territories brings about undue prejudice to the Texas shippers or unduly prefers the Florida shippers any more, for example, than a difference in barge rates from the two territories. The record before the Commission in this proceeding clearly established that rail movements of these commodities are not relevant to whatever competition may otherwise exist between the two territories.

Finally, and conclusively, the Judge's error is demonstrated by his own concession that he has deviated from Commission practice in making a finding of unlawfulness under § 3. At page 34 of the initial decision, he says:

"It is true that under existing practice the mere showing of a lower level of rates for a competitive area, such as Florida, does not demonstrate undue prejudice to Texas and undue preference to Florida in violation of

section 3 of the Act. * * * It may even be necessary under the provisions of the new Act that experience will dictate liberalization of the traditional requirements of proof in regard to undue prejudice and preference."

It is, therefore, obvious that it was recognized by the Judge that no § 3(1) finding had been made or was warranted under governing law. It is inexplicable that, having recognized that uncontrovertible fact, the Judge proceeded to find that the tariff provisions under investigation violate § 3(1) of the Interstate Commerce Act.

It should be emphasized that the Judge's proposed findings as to the Long Island Rail Road depend upon the contention by Long Island that a § 3(1) violation may be found on the basis of its complaint. This is entirely wrong. The Commission has long maintained that § 3(1) findings may not be made in a dispute between carriers, on the basis of carrier evidence alone. (Okla.-Ark. Telephone Co. v. Southwestern Bell, 183 I.C.C. 771, 774.)

Exception No. 5:

To the finding that rates to Long Island points should be increased.

Argument:

The Judge finds that rates to points on the Long Island Rail Road should be increased so that, when coupled to Long Island's local surcharge, the resulting combination

should be the same as single factor rates to non-Long Island points. There is no shipper testimony complaining of the present rate relationship, and the volume of traffic involved, whether it be 1,000 cars to Long Island points, 100 cars, 10 cars or 0 cars, is left entirely to speculation. There is no evidence in the record.

It is conceded that a divisions dispute is in progress between the Long Island Rail Road and the other carriers. In these circumstances, absent any shipper interest on one side or the other of the controversy, there is clearly no necessity nor justification for interim tinkering with joint rates to Long Island points. The proper forum for the controversy between Long Island and the connecting railroads is in the divisions proceeding, not here. It bears emphasis that the rates to Long Island points were not involved in the order of investigation, but represent a broadening or expansion of the issues otherwise presented. That broadening or expansion concerns only the Long Island and the connecting railroads, and has nothing to do with the intrinsic justness and reasonableness of the rates under investigation. It was error, therefore, to take up the Long Island rate issue in this proceeding.

C O N C L U S I O N

For the reasons aforesaid, the Commission must reject those portions of the initial decision which purport to find violations of §§ 1(6) and 3(1) of the Interstate Commerce Act in connection with (1) rates to Long Island points (2) non-availability of a 30,000-pound rate scale and (3) non-availability of stopping in transit privileges.

Respectfully submitted at San Francisco, Calif.,
this 15th day of March 1977.

RICHARD S. M. EMRICH, III

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JOHN MacDONALD SMITH

Attorneys for Respondents
Other Than Long Island Rail
Road Company

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were mailed to all known parties of record in this case this 15th day of March, 1977, as follows:

JOHN MacDONALD SMITH

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
Brownsville Division

CLERK, U. S. DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS

FILED

FEB 18 1977

M. BAILEY THOMAS, CLERK
BY DEPUTY *[Signature]*

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

TEXAS CITRUS AND VEGETABLE
GROWERS AND SHIPPERS, and
GREATER TEXAS MOTOR TRANSPORTATION
BROKER ASSOCIATION,)

Defendants.)

Civil No.

Filed:

B-77-41-24

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendants, and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed under Section 4 of the Sherman Act (15 U.S.C. §4) in order to prevent and restrain the continuing violation of the Act, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. §1).

2. The defendants transact business and are found within the Southern District of Texas.

II

DEFINITIONS

3. As used herein, the term:

- (a) "fresh produce" includes, but is not necessarily limited to, beets, cabbage, cantaloupes, carrots, cauliflower, cucumbers, eggplant,

grapefruit, green onions, honeydew
melons, lettuce, onions, oranges,
peppers, squash, and tomatoes; and

- (b) "lower Rio Grande Valley" means the Texas
counties of Cameron, Hidalgo, Starr and
Willacy.

III

DEFENDANTS

4. Texas Citrus and Vegetable Growers and Shippers
(hereinafter called TCVGS) is made a defendant herein. TCVGS
is a nonprofit corporation organized under the laws of the
State of Texas and has its principal place of business near
Harlingen, in Cameron County, Texas. TCVGS is an association
whose members, among other things, engage in the sale and
shipment of fresh produce.

5. Greater Texas Motor Transportation Broker Association
(hereinafter called GTMTBA) is made a defendant herein. GTMTBA
is an unincorporated association organized in the State of
Texas in 1973 and has its principal place of business in Pharr,
Texas. GTMTBA is an association whose members, among other
things, engage in the business of providing motor transportation
broker services.

IV

CO-CONSPIRATORS

6. Various corporations, firms, and individuals not
made defendants herein have participated as co-conspirators
with the defendants in the violation alleged herein and
performed acts and made statements in furtherance thereof.

The co-conspirators include, but are not limited to, members of TCVGS and GTMTBA during all or part of the period covered by this complaint.

V

TRADE AND COMMERCE

7. Members of TCVGS include virtually all companies engaged in the car lot or truck lot sale and shipping of fresh produce from the lower Rio Grande Valley. In 1975, these members numbered approximately 109, with some 73 having a principal place of business in the lower Rio Grande Valley. Some members own or control acreage from which they grow, sell, and ship fresh produce while others only sell and ship fresh produce.

8. In 1975, the State of Texas ranked third among all states in the United States in total harvested acreage of fresh market vegetables and melons; it also ranked third among states in the production of citrus fruits. The lower Rio Grande Valley accounts for the bulk of fresh market vegetables and melons, and virtually all of the citrus fruits, produced in Texas. In 1975, the value of shipments of fresh produce from the lower Rio Grande Valley is estimated to have exceeded \$125 million, and members of TCVGS accounted for the bulk of such sales and shipments.

9. Fresh produce is sold and shipped from the lower Rio Grande Valley to such receivers as national grocery chains, national grocery cooperatives, and national and regional produce wholesalers. These receivers, who are located throughout the United States, purchase the fresh produce for resale.

10. Transportation of fresh produce to the various receivers is accomplished in most instances by motor carrier, and over 50 percent of all fresh produce shipped from the lower Rio Grande Valley is sold and delivered to receivers located in states other than Texas.

11. During the period covered by this complaint, members of TCVGS sold, and utilized motor carriers to ship, substantial quantities of fresh produce in a continuous and uninterrupted flow of interstate commerce to customers located in states other than Texas.

12. The services of motor transportation brokers, commonly called truck brokers, are frequently utilized by TCVGS members and receivers of fresh produce in arranging the interstate transportation of fresh produce from the lower Rio Grande Valley by motor carrier. Since the organization of GTMTBA in 1973, GTMTBA membership has included most truck brokers serving the lower Rio Grande Valley.

13. Motor transportation brokers serving the lower Rio Grande Valley are persons licensed by the State of Texas who, for a fee or commission, arrange the employment of the motor carriers' equipment in the loading and transportation of fresh produce. Truck brokers accomplish this by matching available motor carriers with loads of fresh produce awaiting pickup and transportation. In the course of their business, it is common for truck brokers to negotiate, on behalf of motor carriers, with TCVGS members or receivers of fresh produce as to the freight rate to be paid for the interstate transportation of the fresh produce.

14. During the period covered by this complaint, truck brokers were utilized to arrange transportation for approximately

50 percent of all shipments of fresh produce from the lower Rio Grande Valley made by motor carrier.

15. During all or part of the period covered by this complaint, members of GTMTBA arranged the transportation of substantial quantities of fresh produce in a continuous and uninterrupted flow of interstate commerce to customers located in states other than Texas.

VI

VIOLATION ALLEGED

16. Beginning at least as early as 1969, the exact date being to the plaintiff unknown, and continuing to the date of this complaint, the defendants and the co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Sherman Act (15 U.S.C. §1). The aforesaid combination and conspiracy may continue or recur unless the relief hereinafter prayed for is granted.

17. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to fix, stabilize, and maintain the rates to be paid for the interstate transportation of fresh produce by motor carrier from the lower Rio Grande Valley.

18. In effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they have combined and conspired to do, including, among other things, the following:

- (a) they prepared, circulated, and regularly revised schedules of rates for the interstate transportation of fresh produce by motor carrier; and

- (b) they encouraged and promoted adherence to such schedules of rates.

VII

EFFECTS

19. The aforesaid combination and conspiracy has had the following effects, among others:

- (a) rates for interstate transportation of fresh produce by motor carrier from the lower Rio Grande Valley have been fixed, stabilized, and maintained at artificial and noncompetitive levels;
- (b) competition in the market for motor carrier services has been restrained; and
- (c) shippers, motor carriers, and receivers of fresh produce from the lower Rio Grande Valley have been deprived of the benefits of free and open competition in the market for motor carrier services.

PRAYER

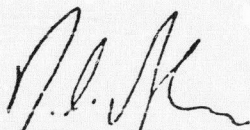
WHEREFORE, the plaintiff prays:

1. That the Court adjudge and decree that the defendants and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.
2. That the defendants, their officers, directors, employees, agents, successors and assigns, and all persons

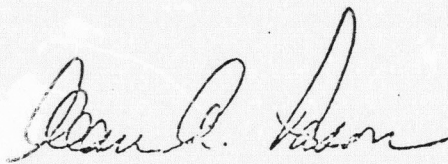
acting or claiming to act on their behalf, be perpetually enjoined from continuing, maintaining, or renewing the aforesaid combination and conspiracy, and from engaging in any other combination, conspiracy, agreement, or understanding having similar purpose or effect.

3. That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

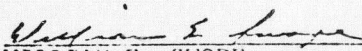
4. That the plaintiff recover the costs of this suit.



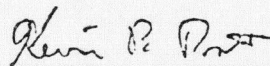
DONALD I. BAKER
Assistant Attorney General



ALAN A. FASON

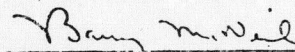


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UNITED STATES ATTORNEY

Reply of the Long Island Rail Road to Respondents' Exceptions.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 36432

FRESH FRUITS AND VEGETABLES, FROM THE SOUTHWEST

REPLY OF THE LONG ISLAND RAIL ROAD
COMPANY TO THE RESPONDENTS' EXCEPTIONS
TO THE INITIAL DECISION OF ADMINISTRATIVE
LAW JUDGE WARREN C. WHITE

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Attorneys for The Long Island
Rail Road Company

Due Date:
April 5, 1977

90a
BEFORE THE
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LAW JUDGE WARREN C. WHITE

I. PRELIMINARY STATEMENT .

It is extremely difficult for The Long Island Rail Road Company ("LIRR") to reply intelligently to the Exceptions filed by the other railroads, in which they object to requirements which Administrative Law Judge Warren C. White in his extremely well-reasoned Initial Decision did not order, but do not take any exception to his principal conclusion and finding, so far as LIRR is concerned, that the rates under investigation constitute an unreasonable practice in violation of Section 1(6) of the Act.

Judge White ordered the rates under investigation cancelled and the proceeding discontinued. The first paragraph of his order reads (at Sheet 35):

"It is the ORDER of the Administrative Law Judge that the respondents herein be, and they are hereby, notified and required to cancel the schedules described in the order entered in this proceeding on September 14, 1976, by Division 2, on or before 35 days from the date of service of this report and order, upon not less than 1 days' notice to this Commission

and to the general public, by filing and posting in the manner prescribed by the Commission under section 6 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued."

It should be noted that there is no prescription of rates to LIRR points or any requirement with regard to such rates. In their Exceptions, however, the other railroads complain (at page 2) that Judge White had proceeded "to prescribe increased rates to destinations on the Long Island," and their Exception No. 5 (at pages 24-25) is "To the finding that rates to Long Island points should be increased." Obviously, Judge White did not make the prescription or requirement to which they object.

As to the respondents' refusal to publish related or alternative rates to destinations on LIRR, Judge White in his Initial Decision made it clear that his finding of unlawfulness was based primarily, if not entirely, on Section 1(6). In his "DISCUSSION AND CONCLUSIONS," Judge White concluded (at Sheet 33):

"Ruling has been made for respondents under section 1(5) as required by law, but it is an unreasonable practice under section 1(6) which results in rates unduly prejudicial to New York area shippers and unduly preferential of other shippers in the same rate group for respondents not to make allowance for the 12-1/2 percent surcharge approved by this Commission for LIRR points in Ex Parte No. 299 (Sub-No. 1) Increases in Freight Rates and Charges - 1973, supra. The petition for reconsideration of those carriers objecting to the special consideration given the LIRR was denied by order of the Commission served December 9, 1976. The determination is therefore administratively final and must be complied with by respondents herein."

In his ultimate "FINDINGS," however, he combined his Section 1(6) finding with his Section 3(1) finding as to the three specific ways in which the

es were found by him to be unlawful, stating (at Sheet 35):

"Consistent with the above conclusions, the Judge finds that the rates under investigation are just and reasonable, but that they constitute an unreasonable practice in violation of section 1(6) and have been shown to be unduly prejudicial and preferential in violation of section 3(1) of the Act to the extent that (1) the said rates and related or alternative rates to points on the LIRR, when combined with LIRR's surcharge, do not make the total transportation charges paid by LIRR receivers the same as those paid by the other receivers in the New York City rate group, (2) do not include a rate level taking a 30,000 pounds minimum weight prescribed herewith as 10 percent above the 40,000 pounds rates herein found just and reasonable, and (3) do not include the privilege of stopping in transit to pickup 3 or more not less than 10,000-pound lots to build a minimum carload of 30,000 pounds." (Underlining added.)

The other railroads take no exception to Judge White's Section 1(6) finding and, in fact, make absolutely no reference thereto. Instead, they omit the first part of Judge White's findings and (at page 16) begin their quotation of the findings after the part underlined above, making it appear as though the finding as to the unlawfulness of the rates with regard to destinations on LIRR was based solely on Section 3(1). It is hoped that the respondents simply did not understand Judge White's Initial Decision and were not intentionally trying to mislead.

The background and the prior litigation between LIRR and the other railroads, as to which the Exceptions are almost totally silent, is helpful in understanding the respondent railroads' Exceptions and LIRR's Reply. As succinctly and accurately stated in Judge White's Initial Decision (at Sheets 19-20):

"The present controversy, insofar as it pertains to LIRR, can be traced back to Public Law 93-69, which added a new Section 15a(4) to the Act in 1973. By that law, the railroads were required to incur substantially higher railroad retirement tax expenses, but were permitted to recapture the increased tax expense through freight rate increases by "any carrier or group of carriers." Because LIRR engages in interstate freight operations, it was also required to pay the increased railroad retirement tax expenses with regard to employees engaged in intrastate passenger operations, and the total additional tax expense incurred by LIRR was relatively much greater than that by any other railroad. All the other railroads, except LIRR, acted as a group and sought a uniform increase in their freight rates to "pass through" the increased tax expense, and the Commission finally approved an increase of 2.8 percent in Ex Parte No. 299, Increases in Freight Rates and Charges -- 1973, 350 I.C.C. 673. Since LIRR's freight revenues totaled less than \$10 million in 1973 and its projected increased railroad retirement tax expense exceeded \$6 million annually, if LIRR had joined with the other railroads, it would have received about \$280,000 or less than 5 percent of the increased tax expense, with the other 95 percent going to other railroads as a "windfall." It would have been an obvious mockery of the law to require LIRR -- whose freight revenues even in 1975 covered barely half of its freight expenses -- to join in the general freight rate increase and recover only 5 percent of the added expenses resulting from the enactment of P.L. 93-69, with the other railroads getting 95 percent of the added revenues authorized to cover LIRR's increased expenses.

"LIRR, therefore, 'flagged out' of the general 2.8-percent increase in Ex Parte No. 299, and published a separate terminal surcharge^{3/} applicable on all freight traffic originating or terminating on points on the LIRR, with all of the proceeds therefrom accruing solely to LIRR. The Commission originally disapproved LIRR's separate terminal surcharge as an interim measure, but the Commission's action was reversed and the tariff approved by

^{3/} The interim surcharge of 3.5 percent effective October 8, 1973, was increased to 5.5 percent effective January 1, 1974, and finally to 12.5 percent effective December 19, 1974. (350 I.C.C. at 705-706)

the three-judge District Court in Long Island R. v. United States, 388 F. Supp. 943 (E.D.N.Y. 1974). The Commission itself then approved the 12.5-percent surcharge in Ex Parte No. 299 (Sub-No. 1), (350 I.C.C. at 705-717) at the same time it approved the 2.8-percent general increase for all the other railroads. A petition for reconsideration by the Commission of its approval of LIRR's terminal surcharge, filed by the Western and Southern lines in Ex Parte No. 299 (Sub-No. 1), was denied by the Commission by order dated November 23 and served December 9, 1976.

"LIRR has, in the past, 'flagged out' or attempted to 'flag out' of several general freight rate increases, and Ex Parte No. 299 did not mark the first time it had done so. In 1969, the evidence indicated that the general increases were self-defeating, so far as LIRR was concerned, with diversion of traffic offsetting the increases in rates. LIRR, therefore, tried to 'flag out' of Ex Parte Nos. 262, 265, 267 and 281, but its efforts to do so were thwarted by the Commission and the other railroads, who refused to honor LIRR's 'flag-outs'. LIRR's right to take such independent action was finally confirmed by the Court of Appeals for the Second Circuit in Ajayem Lumber Corp. v. Penn Central Transportation Co., 487 F. 2d 179 (1974), and LIRR flagged out of Ex Parte Nos. 295 and several subsequent general increases without interference from the other railroads.

"LIRR was, however, forced to concur in most of the general increases as a result of the legislation establishing the Consolidated Rail Corporation. That law apparently gave the new ConRail the option to adopt or reject existing joint rates with other carriers, and ConRail notified LIRR it would not adopt the then-existing joint rates to or from points on LIRR. In a compromise agreement^{4/} with ConRail and the other carriers made effective in March of 1976, LIRR agreed to validate the unlawfully imposed increases in Ex Parte Nos.

^{4/} The Compromise agreement also ended the litigation then pending in Ex Parte No. 309, Investigation Into Joint Interstate and International Rates, Long Island Rail Road Company, when Division 2, by order dated April 23, 1976, discontinued the proceeding, in which the Commission was being asked to prescribe joint rates to and from points on LIRR."

262 through 281 and to join in the Ex Parte No. 295 and subsequent increases, except for Ex Parte No. 299 (2.8 percent) and Ex Parte No. 305 (10 percent). When LIRR's 12.5-percent surcharge is applied to the line-haul charges which, in most cases, are about 12.8-percent lower than those to other destinations in the New York City rate group, the total paid by LIRR receivers is about the same as that paid by their competitors. The compromise agreement enabled LIRR to retain its surcharge to cover its increased railroad retirement tax expense, as intended by the Congress in P.L. 93-69, while at the same time preserving joint rates to or from points on the LIRR and substantially restoring the integrity of the New York City rate group for shippers and receivers."

Some of the other railroads have not, however, given up their fight to try to get some of the money authorized in Ex Parte No. 299 (Sub- No. 1) to offset LIRR's increased tax expense. As is stated in Judge White's Initial Decision (at Sheets 20-21):

"As the present proceeding shows so clearly, some railroads are still determined to frustrate the intent of Congress in enacting P.L. 93-69. Even though they were made whole by Ex Parte No. 299 (and in some cases, received a 'windfall' at the expense of some Eastern lines), the Western lines are insisting they be allowed to share in the revenues ear-marked to cover LIRR's increased retirement tax expense. If they cannot, then they have tried to cancel joint rates to or from points on LIRR, or insist that the total charges paid by LIRR receivers be made 12.5 percent higher than those paid by other New York City receivers, with a consequent diversion of some traffic from LIRR, or else insist that rates to or from points on LIRR be kept at abnormally low levels, with a consequent loss of revenues to LIRR and themselves.

"In I. & S. 9092, Fresh Citrus Fruit, Transcontinental Eastbound, decided July 1, 1976, Review Board Number 4 disapproved the proposed cancellation of certain transcontinental joint commodity rates on fresh citrus fruits to destinations on the LIRR, noting at page 14 that

'respondents have made no reply to LIRR's offer to implement a higher level of rates which would equal the basis to other destinations in the territory.' A petition for reconsideration was denied by Division 2 by order dated October 6 and served October 8, 1976.

"In Docket No. 35960, Sunkist Growers, Inc., et al. v. The Akron, Canton & Youngstown Railroad Company, et al., the railroads voluntarily made effective incentive rates, subject to higher minimum weights, at the X-305 level, which were substantially in accord with the initial decision of Administrative Law Judge Frederick M. Dolan, Jr., served March 4, 1975, but without providing alternative rates to points on LIRR. After a conflict of interest appeared and LIRR disassociated itself from the other railroads, Division 2 by decision and order served August 4, 1976, found that with respect to destinations on the LIRR, 'the failure of defendants to establish alternative rates on the basis of the Ex Parte No. 295 general increase level violates Section 1(5) and 1(6) of the Interstate Commerce Act' and ordered the defendants and LIRR to establish and maintain rates to LIRR at that level. (Since LIRR had flagged out of Ex Parte No. 299 (2.8 percent) and Ex Parte No. 305 (10 percent), the total charges paid by the LIRR receivers, consisting of the line-haul rates plus LIRR's 12.5-percent surcharge, were substantially the same as those paid by their competitors. It was thought by LIRR that the Sunkist decision, now administratively final, had finally resolved the problem of assuring that LIRR would collect its X-299, Sub-No. 1 surcharge necessary to meet its increased tax expenses under P.L. 93-69, while at the same time assuring that LIRR shippers and receivers would pay reasonable and nonprejudicial transportation charges. The instant proceeding shows, however, that some of the railroads are still trying to find some way to frustrate the intent of Congress."

In Respondents' Brief filed herein on or about January 3, 1977, there was an extensive discussion of the Sunkist case (pages 30-34), and much was made of the fact that a petition for reconsideration was still pending. By order dated March 2 and served March 10, 1977, the petition for reconsideration was

denied by the entire Commission, with only one Commissioner dissenting. In their Exceptions, respondent railroads understandably make no reference to the Sunkist decision.

As to the presently effective rates to LIRR destinations, Judge White correctly summarizes the situation in the following language (at Sheet 21):

"The prior rates which were replaced by the rates here under investigation were unquestionably abnormally low and noncompensatory, and the rates to LIRR points still are. The prior rates at the X-330 level were, of course, about 12.8 percent lower to LIRR points than to other points in the New York City rate group because of LIRR's flag-outs in X-299 and X-305, so that when LIRR's surcharge was applied, LIRR receivers paid about the same total charges as their competitors. At the time the proposed new rates were being considered by the General Freight Traffic Committee--Eastern Railroads, LIRR proposed an amendment to make rates to LIRR points which, when coupled with LIRR's 12.5-percent surcharge, would result in the same total charges as to other points in the New York City rate group. The amendment was voted down, and LIRR was given the choice of maintaining its present low level of rates or accepting the New York basis of rates which, when LIRR's surcharge is added, would virtually preclude any movement. Rather than join in such new rates, LIRR kept its low rates."

In their Exceptions, the respondents correctly point out (at page 6) that the old low rates to New York (and, thus the present rates to LIRR destinations) fall far short of covering the variable costs.

The unreasonableness of the respondents' action in refusing to permit related or alternative rates to points on LIRR and presenting LIRR with a Hobson's choice between rates which, with the surcharge, would be 12.5-percent higher and divert all traffic, or the present abnormally low, noncompensatory

rates is made clear in Judge White's Initial Decision in the following language (at Sheet 21):

"It should be clearly understood that LIRR's proposed amendment would result in more revenues for the respondent railroads, and that the rates proposed by LIRR would still be amply compensatory. For example, from McAllen, Tex., to New York, N.Y., the new rate, subject to a 40,000-pound minimum, is \$5.74 per 100 pounds, while the variable costs are \$4.726, resulting in a revenue-cost ratio of 1.27. The present rate to LIRR points is only \$2.97 per 100 pounds at the X-330 level, and the rate proposed by LIRR would be \$5.10, or almost double the presently effective rate. The \$5.10 rate would produce a revenue-cost ratio of about 1.16, which would still be compensatory, and when the \$5.10 rate is subjected to the 12.5-percent surcharge, the total charges paid by LIRR receivers would be about the same as those paid by other receivers in the New York rate group at the \$5.74 rate without the surcharge. In trying to force LIRR to give up its surcharge and to block the rate relationships prescribed in the Sunkist case, the respondent railroads are willing to forego almost half the revenue they would receive under LIRR's proposal."

The respondent railroads argued, in effect, that there was nothing the Commission could do about the predicament in which they had placed LIRR.

As Judge White recapitulates the positions (at Sheets 21-22):

"At the hearing, counsel for the respondent railroads argued that the Commission could not prescribe rates to LIRR points, as it had done in the Sunkist case, because there has been no notice to LIRR receivers that an increase in their rates was being considered and that they would be denied due process. In an investigation of the type here involved, the Commission does, of course, have very broad powers. In Ayrshire Collieries Corp. v. United States, 335 U.S. 573 (1949), the Supreme Court made it clear that in a proceeding under Section 15(7), the Commission has authority to determine the lawfulness not only of the proposed rates, but also that of existing

rates. The new Section 15(8)(f)(1) and (4) under the 4-R Act makes it clear that the new law was not intended to modify the application of Section 3 'in determining the lawfulness of any rate' or 'to affect the authority and the responsibility of the Commission to guarantee the equalization of rates within the same port.' However, in order to avoid any question as to notice or due process, LIRR suggests that the respondents be required to publish related or alternative rates to LIRR points on the statutory 30 days' notice, with such rates being subject to protest and possible suspension and/or investigation."

As indicated previously herein, Judge White did not prescribe related or alternative rate to points on LIRR, as the respondents complain, or even disapprove them "without prejudice," as suggested by LIRR, but simply found them unlawful and ordered their cancellation. It is difficult, therefore, to make an intelligent reply to Respondents' Exceptions, but LIRR will try to do so.

II. REPLY TO EXCEPTIONS

In this Reply, LIRR will not deal with Respondents' Exceptions Nos. 1 and 2 (pages 2-12), which relate to their failure to publish 30,000-pound minimum rates and provide for stopping-in-transit, which will undoubtedly be replied to be the protestant shippers. Whatever decision the Commission ultimately reaches on these two issues will be agreeable to LIRR. This Reply will be confined to the two Exceptions relating to the LIRR rates (Nos. 4 and 5) and, very briefly, to the Respondents' entirely unwarranted personal attack on Judge White (No. 3).

A. Reply to Exception No. 3.

The respondent railroads except (at pages 12-15) to certain criticisms

of them made by Judge White, particularly the language at Sheet 34 of the Initial Decision beginning with:

"The actions of the railroads in terms of transporting fresh fruits and vegetables are unconscionably hypocritical...."

The railroads argue (at page 13):

"The instant adjustment results in large percentage increases in the lower weight brackets because the prior rates were grievously noncompensatory. It is our National Transportation policy, expressed in the 4R Act, that noncompensatory railroad rates be eliminated."

So far as LIRR is concerned, the railroads' actions have certainly been hypocritical and unreasonable. In I. & S. 9092, Fresh Citrus Fruits, Trans-Continental, Eastbound, referred to hereinabove (at page 7), the railroads attempted to cancel transcontinental joint commodity rates on fresh citrus fruits to destinations on LIRR on the ground they were noncompensatory, while at the same time refusing to join with LIRR in a higher level of rates which would equal the basis to other parts of the New York area. Similarly, in the present proceeding, they argue that the National Transportation Policy and the 4R Act require elimination of noncompensatory railroad rates, while insisting that the present noncompensatory rates to LIRR points must be maintained unless LIRR is willing to join in their proposed rates which, with the LIRR surcharge, would virtually preclude any movement of traffic.

Whatever may be said of the railroads' actions with regard to shippers, their actions with regard to LIRR have certainly been hypocritical.

B. Reply to Exception No. 4.

As indicated above, the principal issue in this proceeding has already been decided in the Sunkist case, when the Commission ruled that the failure to establish alternative rates to destinations on the LIRR violated Section 1(6) of the Act. In the Initial Decision herein Judge White similarly concluded (at Sheet 33) that it is an unreasonable practice under Section 1(6) for respondents to publish rates which do not make allowance for LIRR's 12.5-percent surcharge which was approved by the Commission in Ex Parte No. 299 (Sub-No. 1). In his ultimate findings (at Sheet 35), however, Judge White coupled his Section 1(6) finding with a violation of Section 3(1), finding that the rates under investigation:

"...constitute an unreasonable practice in violation of section 1(6) and have been shown to be unduly prejudicial and preferential in violation of section 3(1) of the Act to the extent that (1) the said rates and related or alternative rates to points on the LIRR, when combined with LIRR's surcharge, do not make the total transportation charges paid by LIRR receivers the same as those paid by the other receivers in the New York City rate group, (2) do not include a rate level taking a 30,000 pounds minimum weight prescribed herewith as 10 percent above the 40,000 pounds rates herein found just and reasonable and (3) do not include the privilege of stopping in transit to pickup 3 or more not less than 10,000-pound lots to build a minimum carload of 30,000 pounds."

The Sunkist decision made it clear that the rate action by the respondents in the present case is unlawful in violation of Section 1(6) and would have to be condemned even if there were no Section 3(1) violation. Respondents evidently recognize this and in their Exception No. 4 (at pages -24), make no reference

to the Section 1(6) violation and take exception only to Judge White's finding that the rates involved violate Section 3(1). While the decision would be the same whether or not Judge White made a Section 3(1) finding, it is clear that the respondent railroads' exception to his finding is completely without merit.

Under the Respondents' proposal, LIRR had the choice of (1) increasing the rates to LIRR points to a level which, with the surcharge, would be 12.5-percent above those to other points in the New York City rate group and eliminating the possibility of any movement by rail to LIRR receivers, or (2) maintaining the abnormally low, noncompensatory rates, which are about half the rates here under investigation. Either course would obviously have resulted in a classic violation of Section 3(1), preferring some parts of the New York-New Jersey port district over the others, and unduly preferring some receivers in the New York City rate group while unlawfully prejudicing others. Rather than deprive LIRR receivers of any opportunity to receive rail shipments, LIRR decided to maintain the abnormally low rates and unduly prefer LIRR receivers as the lesser of two evils. In some parts of their confused and confusing Exceptions, the Respondents seem to be under the impression that LIRR knuckled under to their demands and chose the other unacceptable alternative of increasing the rates.

Thus, they argue (at page 18) that Judge White "did not find that whatever prejudice exists as to LIRR receivers results from these rates rather than from the LIRR surcharge." Under the present rate situation, forced by Respondents, of course, the LIRR receivers are preferred, not

prejudiced, and Judge White recognized this fact, even if Respondents did not.

Again, at pages 19-20, Respondents complain there is "no finding to the effect that Texas shippers or any receiver on the LIRR are competitively injured actually or potentially by the tariff provisions under investigation." Obviously, LIRR receivers could hardly be expected to complain because they are paying transportation charges which are a little more than half of those paid by competing New York City receivers. LIRR, not its receivers, is the one being injured. If LIRR had succumbed to the pressures of the other railroads and joined in the rates which, with the surcharge, would have resulted in transportation charges 12.5-percent higher, the LIRR receivers would have been heard from loud and clear.

The Respondents also contend (at pages 21-24) there is no evidence and no finding as to "control or common cause" and similarity of "transportation conditions." This part of their Exceptions is evidently directed to the question of prejudice to the Texas shippers vis-a-vis Florida shippers and not to the preference and prejudice between LIRR receivers and others in the New York City area. With regard to movements to LIRR points such an argument would obviously be ridiculous.

Thus, while the finding of a Section 1(6) violation would have sufficed and Judge White's finding of a Section 3(1) violation was probably unnecessary to disapprove the Respondents' actions with regard to the rates to LIRR points, the Respondents' Exception to the Section 3(1) finding is clearly and completely

without any merit.

C. Reply to Exception No. 5.

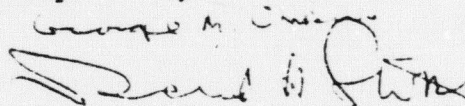
Respondents' claim that Judge White proceeded "to prescribe increased rates to destinations on the Long Island" (at page 2) and their Exception No. 5 "To the finding that rates to Long Island points should be increased" (at pages 24-25) simply ignore the order in the Initial Decision which, as discussed hereinabove, requires merely the cancellation of the unlawful schedules. As was discussed in LIRR's brief herein filed on January 3, 1977 (at page 10), the Commission probably has the power in this case to prescribe related or alternative rates to LIRR points which would restore the integrity of the New York-New Jersey port district and eliminate the unlawful prejudice and preference within the New York City area rate group, but Judge White declined to do so. His Initial Decision correctly finds the present rate action unlawful and orders cancellation of the schedules, while clearly spelling out the corrective measures the Respondents must take before their proposed increased rates could be found lawful.

While LIRR had urged that the rates be found unlawful, without prejudice to their republication together with related or alternative rates to LIRR destinations, Judge White did not adopt this course. His order, merely requiring cancellation of the unlawful schedules, was entirely correct and proper, and Respondents' exception to action which he did not take is obviously without merit.

III. CONCLUSION

For the reasons set forth above, the Commission should find that the Exceptions discussed hereinabove are entirely without merit and should adopt the Initial Decision's findings that the rates under investigation are unlawful in violation of Sections 1(6) and 3(1) of the Act because of Respondents' failure to publish related or alternative rates to points on the LIRR which, when combined with LIRR's surcharge, will make the total transportation charges paid by LIRR receivers the same as those paid by the other receivers in the New York City rate group, and that the unlawful schedules should be cancelled.

Respectfully submitted,



GEORGE M. ONKEN
RICHARD H. STOKES
Jamaica Station
Jamaica, New York 11435

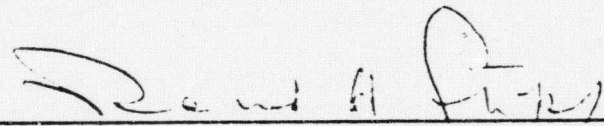
WALTER J. MYSKOWSKI
706 Ring Building
1200 18th Street, N.W.
Washington, D.C. 20036

Attorneys for
The Long Island Rail Road Company

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by first class United States mail, postage prepaid, upon all parties of record.

Dated at Jamaica, New York, this 30th day of March 1977.



RICHARD H. STOKES

I.C.C. Div. 2 Decision and Order Served April 20, 1977.

SERVICE DATE

DECISION AND ORDER

APR 20 1977

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2,
held at its office in Washington, D. C., on the 13th day of April, 1977.

No. 36432

FRESH FRUITS AND VEGETABLES FROM THE SOUTHWEST

Upon consideration of the record in the above-captioned proceeding, including: The initial decision of the Administrative Law Judge served February 24, 1977; the exceptions thereto filed by respondent railroads (excluding the Long Island Rail Road, hereinafter referred to as the LIRR) on March 16, 1977; the reply thereto, including a motion to strike, filed March 28, 1977, by the Texas Citrus and Vegetable Growers and Shippers (Texas Shippers); and the reply filed by the LIRR on April 4, 1977;

It appearing, That as a preliminary matter, Texas Shippers filed a motion to strike certain portions of respondents' exceptions on the grounds that they contain matter irrelevant to this proceeding, prejudicial to its position, and otherwise improper;

It is ordered, That the motion to strike be, and it is hereby, granted; and that page 14, lines 7 through 25, page 15, lines 1 through 17, and the Appendix of the exceptions, are hereby stricken.

It further appearing, That the Administrative Law Judge found that the rates under investigation were just and reasonable, however, they resulted in an unreasonable practice and unduly preferential and prejudicial rates under section 1(c) and 3(l) of the act, respectively, to the extent that: (1) the rates on points to the LIRR when combined with its surcharge, resulted in LIRR receivers paying total transportation charges unequal to those of other receivers in the New York City rate group; (2) the rates do not provide for a 30,000 pound minimum weight at a rate 10 percent higher than the 40,000 pound rate; and (3) the rates do not provide for three multiple stop-in-transit for loading;

It further appearing, That on exceptions, respondents contend that the Administrative Law Judge erred in finding that the rates violated sections 1(c) and 3(l) of the act; that they contend that equalization of total transportation charges on LIRR points is not warranted since this question is essentially a division's dispute; that in addition, no disparity in rates has been established nor have shippers or receivers on the LIRR complained of the rate relationship; and that therefore it has not been shown that LIRR receivers have been unduly prejudiced to the undue benefit of other shippers;

It further appearing, That respondents next argue that the imposition of a 30,000-pound minimum weight at the rate level proposed in the initial decision is not warranted; that respondents argue that the cancellation of the 30,000-pound minimum weight was based on the fact that this traffic was moving at levels far below variable costs; that to increase rates to a level adequately contributing to costs, would result in rates which would not be used by shippers since motor carriers maintained rates lower than rail at the lower weight levels; that these

Exhibit A

prescribed rates are 21 percent higher than shippers have indicated they will pay, as supported by the evidence of record, and therefore, will merely result in paper rates; and that it is contended that further error was also committed by the Administrative Law Judge in concluding that a lack of a 30,000 pound minimum weight resulted in undue prejudice to Texas Shippers and undue preference to Florida Shippers since the evidence failed to establish (a) common control; (b) competition; (c) injury; or (d) similar transportation conditions;

It further appearing, That in reply, Texas Shippers argue that the prescription of the 30,000-pound minima is based on a section 1(6) violation not section 3(1); and that since respondents contend that no traffic will move under the prescribed rates, it illustrates their intent to abandon this market;

It further appearing, That respondents also except to the Administrative Law Judge's prescription of three or more stops in transit in connection with the rates reviewed and approved, or prescribed; that they argue that there is no shipper evidence to support the need for stops-in-transit; that in addition, it is not possible from a practical standpoint to stop cars to complete loading of fresh perishables since speed is of the essence in their delivery; that in actuality, they contend this request would lessen the attractability of rail as a means of transporting the traffic and cause a further diversion of this traffic to motor carriers; that it is also noted, that the initial decision fails to consider the cost-effect of the added stops-in-transit; that the excess of revenue above variable costs is already marginal (revenue-to-variable cost ratio of 133) and additional in-transit stops, with extra switching, way-train mileage, per diem, etc., would dissipate this thin margin; and that therefore, the prescription of multiple pickups would result in non-compensatory transportation in violation of section 1(5)(b) of the act;

It further appearing, That in reply, Texas Shippers argue that the record shows that shippers have demonstrated a need for co-loading in order to market their products successfully and that otherwise, the market cannot absorb great quantities of perishables at one time;

It further appearing, That respondents presented evidence which established that rail carriers handled only 18 percent of the involved traffic (the rest moves by motor carriers); that the Administrative Law Judge, based on this small market share, concluded that the respondents have no market dominance and that the rates are just and reasonable under 31(6)(b) of the act, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (RR Act); that Texas Shippers point out in reply to respondents' exceptions, that the market dominance guidelines did not become administratively final until after the instant investigation was ordered; and that therefore, a discussion of the adequacy of respondents' cost evidence is necessary;

It further appearing, That the exceptions show certain errors in the Administrative Law Judge's evaluation of the facts, conclusions of law and findings; that the expiration of the 7-month period of investigation on April 15, 1977, imperatively and unavoidably requires the omission of a report; that, however, the issues raised on exception and our conclusions thereon are adequately set forth in this order;

No. 36432

We find, That the evidence of record fails to establish that the rates to points on the LIRR, when combined with the LIRR's surcharge,¹ result in unequal total transportation charges in violation of sections 1(6) and 3(1) of the act; that the record does not show that receivers on the LIRR are unduly prejudiced by the difference in rates and none have appeared or otherwise complained that they are so prejudiced; that in fact, as is noted by the LIRR, the rates to points on its lines are lower than rates to other New York group points because they have failed to join in the new rates; that it is also noted by the parties that a division's dispute is in progress between the LIRR and the other carriers; that the 4R Act establishes new procedures for the handling of division disputes in §15(6)(b); and therefore, it is inappropriate at this time to make any determination on this issue;

We further find, That the prescription of 30,000 pound rates is not justified by the evidence of record; that the propriety of a carload minimum must be judged in light of the loading possibility of various articles included in the commodity description and in the case of perishables, the ability and practices of receivers of the load to market their product, Vegetables and Melons Bet. W. & Southwest, Midwest & S., 341 I.C.C. 597 (1972), and Florida Ford Tractor Co. v. Atlantic Coast Line R. Co., 306 I.C.C. 256 (1959); that the record in the present proceeding abundantly demonstrates the necessity for encouraging heavier loadings to secure more economic use of newer large refrigerator cars; that heavier loading will result in lower costs per carton for shippers, receivers, and ultimately the consumer, in addition to raising the traffic to a compensatory level and providing greater per car revenues for the carriers; that the rate structure providing for minimum weights from 40,000 to 90,000 pounds will meet the needs of the carriers for greater per car revenue; that although certain shippers complain that a need exists for a 30,000-pound minimum weight no substantive evidence has been presented to support their contentions; that instead the evidence shows that the heavier loading commodities, carrots, cabbage, and onions (and also potatoes and lettuce), can be loaded to weights of 40,000 pounds or higher; that we also note that similar or higher minimums have been approved on the same or similar commodities in other proceedings, for example Sunkist Growers, Inc., et al. v. The Akron, Canton & Youngstown Railroad Company, et al.,² and that in addition, the evidence fails to establish that the lack of a 30,000-pound minimum will disadvantage Texas shippers to the advantage of Florida shippers, for there is little or no evidence establishing injury, competition, similarity in transportation conditions, or common control;

1

The Long Island Surcharge was considered in Ex Parte No. 277 (Sub-No. 1), Increases in Freight Rates and Charges - 1973, 350 I.C.C. 73 (1976), and is presently under judicial review.

2

The Commission denied the petition for reconsideration of the Administrative Law Judge's decision in an order served March 10, 1977.

We further find, That the requirement that there be multiple stops in transit is not warranted; that presently there exists the opportunity to co-load by exempt agricultural commodity forwarders or two houses; that requiring multiple stops in transit would result in a further deterioration of the expedited service so necessary in the transportation of perishable commodities; and that in addition, we are unable to determine the costs of providing this service and whether it could be performed at a compensatory level by respondents under the assailed rates;

We further find, That on October 1, 1976, the regulations promulgated in Ex Parte No. 320, Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization and Regulatory Reform Act of 1976, became administratively final; that this investigation was instituted on September 17, 1976; that, however, the hearings were held on November 15 and 16, in which evidence was presented on the question of whether or not respondents have market dominance over the involved traffic; that respondents adequately demonstrated and protestants conceded that there is no market dominance; and that since this subject was addressed by the parties, the Administrative Law Judge properly considered this issue before making any determination on the justness and reasonableness of the assailed rates;

We further find, That considering all the evidence of record, the investigated rates are shown to be just and reasonable and otherwise lawful;

It is ordered, That in adopting the Administrative Law Judge's initial decision as our own, except to the extent modified above, the following additions and modifications be, and they are hereby, made:

- (1) On sheet 1, under the case heading, strike the syllabus and substitute the following:

Upon investigation, the proposed level of incentive rates on fresh fruits and vegetables from Texas origins to destinations in the midwestern, eastern, and southern States, found to be just, reasonable, and otherwise lawful. Proceeding discontinued.

- (2) On page 33, strike all material following line 9.
- (3) Strike page 34.
- (4) Strike lines 1 through 8 on page 35.
- (5) On page 36, strike the first two paragraphs under the heading "Findings".

It is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, Division 7, Counsel Gregory Hurdle, Clapp, and Christman.

(SPAL)

ROBERT L. GEWALD,
Secretary.

Petition for a Finding of General Transportation Importance.

Before the
INTERSTATE COMMERCE COMMISSION

A COPY

Docket No. 36432

FRESH FRUITS AND VEGETABLES FROM THE SOUTHWEST

PETITION FOR A FINDING OF
GENERAL TRANSPORTATION
IMPORTANCE

In a Decision and Order in this proceeding, served April 20, 1977, Division 2, by amending and in effect reversing the Initial Decision of Administrative Law Judge Warren White served February 24, 1977, put itself in conflict with the prior decisions of the entire Commission issued in Increases In Freight Rates and Charges-1973, Ex Parte 299 (Sub No. 1) 350 ICC 673 and in Sunkist Growers, Inc. et al. v. AC & Y R Co., et al., Docket 35960.

The result of Division 2's overruling of the aforementioned decisions of the entire Commission, if not corrected herein by the entire Commission, will be to throw into confusion the entire rate structure to and from points on LIRR and will prevent an orderly resolution of the differences and litigation presently pending before the Commission and the Courts between LIRR and a number of other railroads.

At page 3 of its aforementioned Decision and Order, Division 2 first found that the evidence of record failed to establish that the rates to points on LIRR, when combined with the LIRR's surcharge, result in unequal total transportation charges in violation of Sections 1(6) and 3(1) of the Act. Inconsistently, Division 2, then, in the same paragraph, goes on to find that the rates to points on LIRR's lines are lower than rates to other New York group points because LIRR has failed to join in the new rates. While noting this difference in rates to LIRR points, Division 2 fails to point out that if LIRR had joined in the new rates, there would still be a disparity in the rates since the

rate structure to LIRR points would then exceed that to other points in the New York rate group by the amount of its surcharge. Division 2, in the same paragraph, also held that it was inappropriate at this time to make a determination of the issue of the LIRR rate structure because a divisions dispute is in progress between LIRR and the other carriers.

In Ex Parte 299 (Sub No. 1) 350 ICC at p. 716, the Commission specifically stated:

"...it clearly follows that the assertion that the terminal surcharge changes the joint rates and increases the divisions to the Long Island is incorrect. The joint rates and divisions thereof are unchanged by the surcharge tariff."

In the Sunkist Growers proceeding, supra, Division 2, by Decision and Order served August 4, 1976, held that the failure of other railroads to establish alternative rates to points on LIRR which, when combined with LIRR's surcharge, would equal the rates maintained to other New York rate group points, violated Section 1(6) of the Act. By Order served March 10, 1977, the entire Commission affirmed the Decision and Order of Division 2 and denied the other railroads' petition for reconsideration (a petition for clarification in regard to this Order is still pending).

In addition, sight should not be lost of the aspect that this Decision and Order of Division 2, if allowed to stand, will have the effect of putting the Commission's imprimatur upon the efforts of various railroads, led by Southern Pacific, to undermine and sabotage the interim settlement reached between LIRR and Conrail with the concurrence of the other railroads. At the conference before Division 2 in Ex Parte 309 in February 1976, Division 2 was advised that Conrail had agreed to adopt joint rates and routes with the LIRR if the LIRR, with the concurrence of all the other railroads, would accept all of the previous general freight rate increases it had flagged out of except for

Ex Parte 299 and Ex Parte 305. It was understood by all concerned, including Division 2, that the resulting rate structure, when coupled with LIRR's surcharge would, in essence, restore the integrity of the New York rate group. On this basis, Division 2 ordered Ex Parte 309 discontinued and it is this understanding and interim settlement which Southern Pacific is attempting to sabotage in the instant case and which should not be condoned by the Commission.

Unless and until the Commission does clarify the situation, it will be impossible for LIRR to work out a basis with the other railroads to establish an orderly rate basis to and from LIRR points. To attempt to equalize the situation, LIRR will be forced to accept some rate increases and at a later date to flag out of general rate increases to compensate therefor and thereby cause additional future problems and confusion in the overall tariff and rate structures of the nation's railroads.

WHEREFORE, it is respectfully requested that the Commission find that an issue of general transportation importance is involved and reconsider the Decision and Order of Division 2 in this proceeding.

Respectfully submitted,

GEORGE M. ONKEN
RICHARD H. STOKES
Jamaica Station
Jamaica, New York 11435

WALTER J. MYSKOWSKI
706 Ring Building
1200 18th St., N.W.
Washington, D.C. 20036

Attorneys for The Long Island Rail Road Company

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of interest by first class United States mail.

DATED: Jamaica, New York, this 22nd day of April, 1977.

RICHARD H. STOKES

Petition of Freight Users Association of Long Island, Leave to Intervene.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

RECEIVED
LAW DEPT.

APR 29 1977

THE LONG ISLAND
CARPENTERS COMPANY

DOCKET NO. 36432

FRESH FRUITS AND VEGETABLES FROM THE SOUTHWEST

PETITION FOR LEAVE TO INTERVENE

FREIGHT USERS ASSOCIATION OF LONG ISLAND, INC.

George Carl Pezold
Attorney for Petitioner .

Of Counsel
Augello & Pezold, P.C.
120 Main Street
Huntington, New York 11743
(516) 427-0100

DATED: April 28, 1977

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET NO. 36432

FRESH FRUITS AND VEGETABLES FROM THE SOUTHWEST

Freight Users Association of Long Island, Inc. ("FUA") is a not for profit corporation organized under the laws of the State of New York, with principal offices in the Town of Huntington, County of Suffolk, State of New York. Membership of FUA is comprised of approximately forty shippers and consignees of rail freight on Long Island. The Association has acted as the principal spokesman and representative of Long Island's freight users vis-a-vis the Long Island Rail Road since 1970 with respect to rail freight service, rates, tariffs and related matters.

At the time this proceeding was instituted and first came to the attention of the Association, it appeared that the subject matter of the proceeding was not of sufficiently general interest to our membership to justify the effort and expense of intervention and participation as a full and active party; counsel was only directed to place its name on the service mailing list and to monitor the proceeding.

Accordingly, the Association, through its counsel, has monitored the various developments in this proceeding, including the initial decision of the Administrative Law Judge served February 24, 1977, and the decision and order of Division 2 served April 20, 1977.

Although the Association was not initially concerned about the specific incentive rate items involved in this proceeding, it was very much concerned about any decision which might set a precedent having future applicability to the rate structure for the Long Island Rail Road, or the relationship between Long Island rates and those of the surrounding metropolitan New York area in which its members do business. From this standpoint, the initial decision of the Administrative Law Judge, which essentially directed the carriers to establish rates on points to the Long Island which, when combined with its 12-1/2% surcharge, would result in LIRR receivers paying total transportation charges which were equal to those of other receivers in the New York rate group, was a reasonable and acceptable solution. Furthermore, this approach by the Administrative Law Judge was consistent with other Commission decisions such as the decision in Docket No. 35960, Sunkist Growers, Inc. v. AC & Y RR, as well as the settlement which had been negotiated between the LIRR and ConRail and concurred in by the other carriers, and which was given as a basis for the discontinuance of proceedings in Ex Parte No. 309. In short, the position of shippers and receivers on Long Island and the position of this Association is that the total transportation charge paid by customers on Long Island should be substantially equal to the charges paid by their competitors in the surrounding New York metropolitan area. Long Island receivers do not wish to become involved in divisions disputes and inter-railroad matters; they only wish to compete on an equal footing with businesses in their market area.

Accordingly, the decision of Division 2 which was served April 20, 1977 and which reverses the findings of the Administrative Law Judge vis-a-vis the LIRR rates is great cause for alarm and serious concern to the Association and its members. Clearly, the effect of this decision, if allowed to stand, could be to impose on the LIRR customers a rate structure 12-1/2% higher than the New York, New York rate group. Such a precedent could easily be applied and could spread to the numerous other commodities which are shipped and received by our members. Clearly, the extension of Division 2's decision and order to other rates and charges could have major financial consequences to the Long Island freight using community.

WHEREFORE, it is respectfully requested that the petition of the Freight Users Association of Long Island, Inc. to intervene in the above captioned proceeding be granted and, further, that the Commission find that an issue of general transportation importance is involved and reconsider the decision and order of Division 2 in this proceeding.

Respectfully submitted,

George Carl Pezold
Attorney for Petitioner

Of Counsel
Augello & Pezold, P.C.
120 Main Street
Huntington, NY 11743
(516) 427-0100

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document by first class United States mail, postage prepaid, upon all parties of interest.

Dated at Huntington, New York this 28th day of April, 1977.

GEORGE CARL PEZOLD

Reply to Petition for Leave to Intervene.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 36432

FRESH FRUITS AND VEGETABLES,
FROM THE SOUTHWEST

REPLY TO PETITION FOR
LEAVE TO INTERVENE

RICHARD S. M. EMRICH, III
210 North 13th Street
St. Louis, Mo. 63103

JOSEPH M. O'MALLEY
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

JOHN MacDONALD SMITH
Southern Pacific Bldg., Rm. 813
One Market Plaza
San Francisco, Ca. 94105

DUE DATE: May 18, 1977

Attorneys for Respondents (Other
Than Long Island Rail Road Company)

COME NOW respondents (other than Long Island Rail Road Company) and respectfully request that the Petition of Freight Users Association of Long Island, Inc., for Leave to Intervene, be denied. This petition is (1) late, (2) fails to show good cause for intervention at this stage of the proceedings and (3) is evidently based upon a misunderstanding of fact.

This is an investigation proceeding instituted upon the Commission's own motion into the reasonableness of rates on fresh fruits and vegetables from the Southwest to Midwestern and Eastern destinations. The procedural calendar established by the Commission for this proceeding allowed all parties having any interest in the matter maximum opportunity for presentation of evidence and views. An oral hearing was held at Washington, D.C. Witnesses residing in Texas and California traveled to Washington for the hearing, as did counsel from St. Louis, San Francisco, and Philadelphia. The petition for leave to intervene avers that the association was fully aware of the pendency of the proceedings but made no effort to participate at the hearings.

After the hearing, the Administrative Law Judge directed the filing of briefs by all parties. Briefs were filed, and the Association made no move to intervene. An initial decision was issued by the Administrative Law Judge, to which exception was taken by these respondents, to which replies were filed by Long Island and protestant. On April 20,

1977, Division 2 issued its decision in the matter, an administratively final decision which points out, correctly, that no evidence was adduced by receivers on the Long Island to warrant the special prescription of differential rates sought by Long Island Rail Road Company.

At this point, the Freight Users Association of Long Island belatedly seeks leave to intervene in support of the position of Long Island Rail Road Company. The only explanation for the silence of the Association to this late point in the proceeding is, in substance, that the ultimate result was not expected and may result in higher rates on the involved commodities to Long Island Rail Road points.

The Association could have intervened at the hearing without filing a formal petition for leave to do so; Rule 73. The Association did not do so, and its sought intervention is therefore governed by Rule 72. Paragraph (b) provides:

"(b) When filed. A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after except for good cause shown."

Intervention at this point thus requires a showing of "good cause". The only proffered showing of good cause is essentially that the Association did not anticipate and does not like the result. This does not constitute a showing of good cause:

"As a basis for intervention, they state that they did not anticipate that the Examiner would recommend approval of the application without a restriction on the operating rights now held by Carbon Motor Way, Inc. ... In our opinion, sufficient good cause for failure to timely file the petition has not been shown as required by the provisions of Rule 1.72 of our General Rules of Practice, .."
(Rio Grande Motor Way, Inc. -- Control and Merger, 87 M.C.C. 479 (479-80))

And, of course, a failure to show good cause for post-hearing intervention compels denial of the petition. Sierra Distributing -- Purchase -- FTS Transport System, 97 M.C.C. 294, 295.

While the preceding cases involve motor carriers, it should be noted that the Commission has recently put parties on notice that petitions seeking post-hearing intervention in rate investigations also require a showing of good cause. Classification Ratings on Clothing, NOI, 349 I.C.C. 204, 208 (March 6, 1975). Not only has petitioner failed to show good cause for the sought intervention, but it is not even established that petitioner has any direct interest in the subject matter of this proceeding. We note that there is no averment that any of the members of the Association receive commodities subject to the rates under investigation. The averments as to the businesses of the members of the Association are very vague, and it does not appear that any of them receive perishables by rail from Texas origins. Even if they should, however, it does not follow that the rates on such traffic will

necessarily be increased to a level higher than otherwise applicable to nearby points not on the Long Island. While petitioner engages in conjecture that this might happen, it should be noted that the Commission's order contains no affirmative direction to Long Island to increase rates to that extent. While the origin lines have a continuing offer to Long Island to join in single factor joint through rates to Long Island destinations on the same level as apply to other destinations in the State of New York, Long Island has to date seen fit not to accept that offer, and has not concurred in rate levels applicable elsewhere in the same destination territory. If and when Long Island elects to join in such rates, any application of local surcharge will be a matter strictly between petitioners and the Long Island Rail Road. No such action is mandated or suggested by the Commission's final decision in this docket.

Respectfully submitted at San Francisco, Ca., this
11th day of May, 1977.

RICHARD S. M. EMRICH, III
210 North 13th Street
St. Louis, Mo. 63103

JOSEPH M. O'MALLEY
1138 Six Penn Center Plaza
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JOHN MacDONALD SMITH
Southern Pacific Bldg., Rm. 813
One Market Plaza
San Francisco, Ca. 94105

By _____

Attorneys for Respondents (Other
Than Long Island Rail Road Company)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were mailed to all known parties of record in this case this 11th day of May, 1977.

JOHN MacDONALD SMITH

I.C.C. Order Served May 25, 1977.

For Mr. Stokes
from C. H. Kunkel
— Washington, D. C.

SERVICE DATE

ORDER

MAY 25 1977

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on this 18th day of May, 1977.

No. 36432

FRESH FRUITS AND VEGETABLES, FROM THE SOUTHWEST

Upon consideration of the record in the above entitled proceeding, and the petitions filed May 2, 1977, by Freight Users Association of Long Island, Inc., for leave to intervene; and April 25, 1977, by The Long Island Railroad and May 4, 1977, by Texas Citrus and Vegetable Growers and Shippers, seeking a finding that an issue of general transportation importance is involved:

It is ordered, That the petitions be, and they are hereby, denied for the reason that sufficient grounds have not been presented to warrant granting the action sought.

By the Commission. (Commissioner Christian voted to grant the petition for leave to intervene. Chairman O'Neal did not participate.)

ROBERT L. OSWALD
Secretary

(SEAL)

BEFORE THE INTERSTATE COMMERCE COMMISSION

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:
In the Matter of: :
:
FRESH FRUITS AND VEGETABLES, : DOCKET NO. 36432
FROM THE SOUTHWEST :
:
----- x

Interstate Commerce Commission
Hearing Room B
12th & Constitution Avenue, N.W.
Washington, D. C.

Monday, November 15, 1976

Met, pursuant to notice, at 9:30 a.m.,

BEFORE:

THE HONORABLE WARREN C. WHITE
Administrative Law Judge

APPEARANCES:

JOHN MAC DONALD SMITH, ESQ.
Room 813
One Market Street
San Francisco, California 94105
On behalf of the Respondents, Southwestern, Eastern
and Southern Carrier Parties to the Southwestern
Lines Tariffs

JOSEPH M. O'MALLEY, ESQ.
1138 Six Penn Center
Philadelphia, Pennsylvania 19104
On behalf of the Respondent, Consolidated Rail
Corporation

RICHARD S. M. EMRICH, III, ESQ.
210 North 13th Street
St. Louis, Missouri 63103
On behalf of the Respondent, Missouri Pacific Railroad

RONALD K. KOLINS, ESQ.
1666 K Street, N. W.
Washington, D. C. 20006
On behalf of the Protestant, Texas Citrus and
Vegetable Growers and Shippers

127a

1 APPEARANCES: (Continued)

2 RICHARD H. STOKES, ESQ.
Jamaica Station

3 Jamaica, New York 11435
4 On behalf of the Intervenor, The Long Island Railroad
Company

5 WALTER J. MYSKOWSKI, ESQ.
Ring Building

6 Washington, D. C. 20006
7 On behalf of the Intervenor, The Long Island Railroad
Company

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7070 NEW HAMPSHIRE AVENUE, SUITE 210 • LANGLEY PARK, MARYLAND 20703 • (301) 432-6000

C O N T E N T SEXAMINATIONWITNESSESDIRECTCROSSREDIRECTRECROSSRespondents'

William Clayton, Jr.
(Southern Pacific
Transportation Co.)

By Mr. Smith	6	--	--	--
By Mr. Stokes	--	8	--	--
By Mr. Kolins	--	35	--	--

Klaus Brandt
(Southern Pacific
Transportation Co.)

By Mr. Smith	108	--	152	--
By Mr. Kolins	--	120	--	--

Arthur E. Capps, Jr.
(Missouri Pacific
Railroad Co.)

By Mr. Emrich	158	--	--	--
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EXHIBITSNUMBERFOR IDENTIFICATIONIN EVIDENCERespondents'

1	(Witness Clayton)	6	107
3	(Witness Brandt)	108	157
4	(Witness Brandt)	109	157
5	(Witness Capps)	159	--

Intervenors'

2	(Counsel Stokes)	89	89
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AFTERNOON SESSION

(2:15 p.m.)

Judge White: Back on the record.

Mr. Stokes: Your Honor, before we recommence, Mr. Smith and I have had a conversation during the luncheon recess, and I think that insofar as the intervention of Long Island Railroad is concerned, we can take care of our presence here very briefly by the stipulation of one exhibit and I guess, just briefly one or two facts that you want on the record too, Mr. Smith.

And then we can happily pack up our bags and go back, and we'll argue it on brief as to what the significance of our intervention is.

Judge White: Fine.

Mr. Stokes: I have furnished counsel with copies of the proposed exhibit, which is the counter-proposal made by the Long Island Railroad in the General Freight Traffic Committee; Eastern Railroads. It speaks for itself.

Judge White: Well, could we mark it and receive it as Exhibit 2, then.

(Whereupon, the document was marked Intervener's Exhibit No. 2, Counsel Stokes, for identification and received in evidence.)

Mr. Smith: Your Honor, in receiving Exhibit 2, I think I should make clear that my stipulation with Mr. Stokes is

1 for the purpose of conveniently and expeditiously putting
2 the position of the Long Island before the Commission.

3 And I have objection to the relief sought by the Long
4 Island. I have objection to the Long Island's participation
5 and their status in this proceeding.

6 I have specific objection to that portion of the exhibit
7 which purports to establish that the relief which the Long
8 Island seeks was confirmed by a conference before the ICC,
9 February 18, in connection with Ex Parte 309; that's a self-
10 serving interpretation by Long Island of the results of that
11 conference.

12 I want the Judge to understand that our stipulation and
13 our agreeing to have the exhibit received does not waive any
14 of our objections to relief sought by the Long Island.

15 Mr. Stokes: That's perfectly understood and agreeable.
16 It's absolutely without prejudice to Mr. Smith arguing any
17 position in regard to our intervention.

18 Judge White: And you say you would like to argue this
19 then on brief. I'll set the brief date for you as of January
20 the 3rd, 1977.

21 Mr. Stokes: All right. I assume that the transcript,
22 too, of the record will be available in roughly 10 days,
23 2 weeks? I'll address that to the Reporter.

24 The Reporter: Yes, sir.

25 Mr. Stokes: Then I believe, Mr. Smith, you also wanted

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1 noted on the record the docket number of the Divisions case
2 that involved the Long Island Railroad, which was decided by
3 the Commission in October, 1973.

4 Mr. Myskowski, what was that number?

5 Mr. Myskowski: Docket Number 35153.

6 Mr. Stokes: 35153 is the docket number.

7 Mr. Myskowski: It's not finished.

8 Mr. Stokes: It's an unrecorded decision. If it's
9 agreeable with the Examiner and with Mr. Smith, I will
10 undertake to furnish all counsel with a copy of that decision
11 and furnish the Administrative Law Judge with a copy of it
12 for whatever purpose it serves.

13 Mr. Emrich: What is the status of the decision?

14 Mr. Stokes: That decision, that's final; it's in effect.
15 Our divisions have been changed in accordance with that
16 decision.

17 Mr. Smith: Well, may I assist -- and perhaps Mr. Stokes
18 can agree that this is the fact -- that for many, many years --
19 I don't know how many, whether it's 20, 30, or 40 -- but for
20 many years past, there has been an established basis of
21 divisions for the Long Island Railroad on interterritorial
22 traffic, i.e., traffic originating in the southwest moving
23 to points on the Long Island under single factor joint
24 through rates. There has been a certain percentage which
25 the Long Island has received under those divisions' agreements

1 The 1973 decision referred to adjusted the divisional
2 split within the eastern territory, without necessarily affect-
3 ing the divisional split between the east, on the one hand, and
4 the west, on the one hand. Am I right so far?

5 Mr. Stokes: That's correct, Mr. Smith. Excuse me --
6 if I may, Your Honor. Mr. Myskowski is my co-counsel. I
7 would --

8 Judge White: Well, let him put his name on your
9 appearance.

10 Mr. Myskowski: Walter J. Myskowski, M-y-s-k-o-w-s-k-i,
11 706 Ring Building, Washington, D. C. 20036. And I'm
12 appearing on behalf of the Long Island Railroad. I'm an
13 attorney admitted to practice before the Commission.

14 Your Honor, could I reply to Mr. Smith's statement?

15 Judge White: You may proceed.

16 Mr. Myskowski: The Long Island divisions, Your Honor --
17 the principal divisions which, at that time, covered 81 percent,
18 now cover about 90 percent of the underlying traffic -- are
19 such that the Long Island gets to share out of the total
20 through-rate.

21 And that share is in no way governed by what the primary
22 -- so called primary -- divisions between territories are
23 at that time. In other words, Long Island on west coast
24 traffic at that time was receiving, say, 4.4 to 6.0 percent,
25 and the decision gave it an increase of about 20 percent.

1 Now, as it turned out, the Long Island increase came out
2 of the eastern lines' share. But that's not the way the
3 divisions are set up. The Long Island gets so much of the
4 through-rate.

5 Mr. Smith: Well, Your Honor, I'm not really concerned
6 about how it is carved up in the east. What I wanted to
7 establish is that the present basis of divisions of joint
8 through-rates, from Texas points to points in the Long Island,
9 is subject to -- Mr. Myskowski, are you saying -- a Commission
10 prescription in 1973?

11 Mr. Myskowski: Which gives the Long Island a certain
12 percentage, and it doesn't matter -- the Long Island has no
13 concern how the rest, the other 90 percent, is divided. And
14 the Commission has not prescribed it.

15 Mr. Smith: Okay. Now, from that predicate, I will ask
16 Mr. Stokes and Mr. Myskowski to agree if it is not a fact
17 that the Long Island served notice under the 4-R Act of a
18 prospective complaint against that divisional basis and
19 served it on the various traffic territorial chairman.

20 Mr. Stokes: We did serve notice on the other carriers
21 that we desired to renegotiate divisions with them. As to
22 whether there will be a prospective complaint or not, that
23 depends upon what possibly gets worked out. But we have
24 served notice upon all the other carriers in the United
25 States of the desire to renegotiate our divisions.

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1 Mr. Smith: And that notice, as I understand it, was
2 served pursuant to the requirements of the 4-R Act?

3 Mr. Stokes: Well, I don't know about the requirements
4 of the 4-R Act. I know the Commission in 322 indicated --
5 Ex Parte 322 -- indicated that before a carrier could even
6 file a notice of intent to file a complaint, that there must
7 be at least six months of bona fide negotiations between
8 railroads.

9 To the extent that we are seeking to renegotiate between
10 divisions of other railroads, certainly, we would be in
11 compliance with, I believe, the requirements of the Commission
12 in Ex Parte 322. But our letter notice speaks for itself --
13 that we are seeking to renegotiate divisions.

14 Mr. Smith: I think, Your Honor, that sufficiently
15 portrays the facts for the purposes in my arguments. I think
16 it is undisputed that there is a divisions disagreement in
17 progress between the Long Island and the Southwestern Freight
18 Bureau Railroads.

19 Judge White: Really, this isn't the right forum for
20 a decision.

21 Mr. Stokes: On divisions, I agree absolutely, Your Honor,
22 it's not. But as part of my agreement with Mr. Smith -- that
23 he wanted these facts on the record so he would be able to
24 argue from them in whatever relevance he sees fit on them.

25 I would tend to agree that a divisional dispute is really

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1 not between us; it's a rate matter that we're dealing with.

2 Judge White: The cited case -- we will not file that
3 as a late filed exhibit. If you will just forward a copy to
4 Mr. Smith and a copy to me at the same time in a letter, I'm
5 sure that will be adequate.

6 Mr. Stokes: Very good, Your Honor. I would also want
7 to --

8 Judge White: And other counsel.

9 Mr. Stokes: Yes, I will serve all counsel. I also do
10 want to indicate on the record that we will also be making
11 reference to the Commission's decision in Ex Parte 299 Sub
12 Number 1, which is in regard to the terminal surcharge for
13 the Long Island Railroad.

14 Judge White: All right. Fine.

15 You're excused, then, whenever you wish to leave.

16 Mr. Stokes: Thank you very much, Your Honor. Thank
17 you too, Mr. Smith, for your courtesy.

18 Mr. Smith: Thank you.

19 Judge White: Back to you, then, Mr. Kolins.

20 Mr. Kolins: Thank you, Your Honor.

21 Q (By Mr. Kolins) Mr. Clayton, I refer you to Exhibit
22 WMC-1, which is attached to your statement. And if I am
23 properly interpreting that exhibit, at the various minimum
24 weight levels, you have set forth the rates which were pro-
25 posed in I & S 8944, which would be under column number one,

Intervenor's Exhibit 2.



GENERAL FREIGHT TRAFFIC COMMITTEE—EASTERN RAILROADS
TWO PENNSYLVANIA PLAZA NEW YORK, N. Y. 10001

The following amendment is submitted and in the absence of objections within 10 days of the date hereof and the Chairman concludes no Research Group report is necessary, the views of all members will be recorded in the affirmative and an announcement will be made accordingly. An objection registered by a member will result in the issuance of a Research Group report.

SHORT PROCEDURE Carrier's Amendment

WILLIAM J. BOLCH, CHAIRMAN

Date: MAY 27 1976

SUPPLEMENT NO. 1 TO
SUBMITTAL NO. F410S-269

THE PROVISIONS PROPOSED, IF EFFECTIVE, () WILL (x) WILL NOT RESULT IN AN ADVERSE EFFECT ON THE QUALITY OF THE HUMAN ENVIRONMENT.

AMENDMENT TO SUBMITTAL NO. F410S-269

DATED May 21, 1976

DESCRIPTION OF ORIGINS, DESTINATIONS, RATES OR CHARGES IN ORIGINAL SUBMITTAL:

Fruits, Fresh (not cold-pack nor frozen) or Vegetables, fresh or green (not cold-pack nor frozen), etc.

From: Origins in SWL Territory

To: Destinations in Eastern, IFA, SFTB and WTL Territories

Minimum Weight: 40,000, 50,000, 60,000, 70,000, 80,000 and 90,000 pounds.

SUGGESTED ADDITIONAL ORIGINS, DESTINATIONS, RATES, ETC.:

In connection with rates to or from LIRR; scales as proposed amended to reflect a 12.5% reduction.

CAR DETENTION PROVISIONS:

SUGGESTED ROUTING:

FOURTH SECTION: ()--SEEK RELIEF. ()--F.S.O. 18025. ()--F.S.O. NO.

RULE 27: ()--ALL ROUTES; ()--FOLLOWING SHORT TARIFF ROUTE, VIZ:
MILES:

DIVISIONS Established

REPARATION INVOLVED: No

INITIATED BY: (x)--CARRIER; ()--SHIPPER; ()--CARRIER FOR SHIPPER.

BASIS AND JUSTIFICATION OFFERED FOR ADDITIONAL CHANGES:

Amendment as here proposed is required in order to maintain the position of the Long Island Rail Road which was confirmed at the conference before the Interstate Commerce Commission February 18, 1976, in connection with Ex Parte 309. Resultant rates when treated by our terminal surcharge will provide, as near as possible, equal rates at points in the N.Y., N.Y. rate groups.

United States Court of Appeals
For the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

The Long Island Rail Road Company
Petitioner

v.

The United States of America and The Interstate Commerce Commission
RespondentsS & K. Farms Inc., and Freight Users Association of Long Island Inc.,
Intervening Petitioners

State of New York, County of New York, ss.:

Raymond J. Braddick,
agent for George M. Onken Esq., being duly sworn deposes and says that he is
the attorney

for the above named Petitioners

herein. That he is over

21 years of age, is not a party to the action and resides at 8 Mill Lane Levittown, New York 11756

That on the 2nd. day of August, 1977, he served the within
Joint Appendix

upon the attorneys for the parties and at the addresses as specified below

Walter J. Mykowski
706 Ring Building 1200 18th. Street N.W.
Washington D.C.Robert L. Thompson and Andrea Linmer
Attorney for Respondent, United State of America
Department of Justice
Washington D.C.Kenneth G. Kaplan
Attorney for Respondent
Interstate Commerce Commission
Washington D.C.

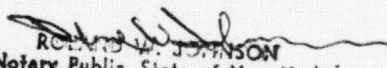
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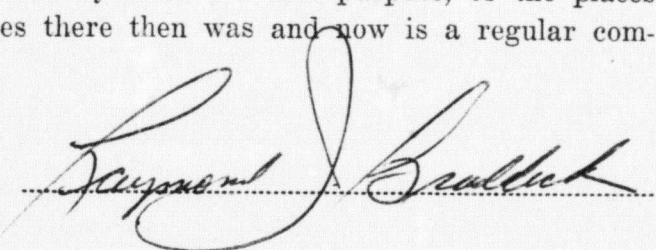
Robert P. Shaughnessy
80 Pine Street
New York, New York

John Mac Donald Smith
Southern Pacific Building
One Market Plaza
San Francisco California
Attorney for Intervening Respondents

by depositing **3 true copies to each**
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 2nd.
day of August, 1977


ROBERT W. JOHNSON
Notary Public, State of New York
No. 4507705
Qualified in Delaware County
Commission Expires March 30, 1974



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